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The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel

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ARTICLES

The Emperor *Gideon* Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel

By RICHARD KLEIN*

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Introduction

The sixth amendment right to counsel does not merely supplement other constitutional rights. Counsel serves to insure the operation of procedural and constitutional protections guaranteed to a criminal defendant. As the Supreme Court has stated, "There is no right more essential than the right to assistance of counsel. . . ."¹ The right to counsel is a

1. *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978).

precondition of a fair trial; the active participation of defense counsel in the entire criminal process is crucial for the functioning and fairness of the adversary system.² If the criminal process loses its adversarial character, the constitutional guarantee is violated.³

This Article details how the severity of the underfunding of those agencies providing defense counsel to the indigent seriously endangers the sixth amendment guarantee to effective assistance of counsel. The resulting threat to the integrity of the adversary system is so serious, and the likelihood of additional funding from public sources so dim, that the legal profession itself must act to provide supplemental revenues for the defense of the indigent accused.

I. Establishment of the Indigent Defendant's Right to Effective Assistance of Counsel

A. The Right to Counsel

The Supreme Court first acted in 1932 in *Powell v. Alabama*⁴ to redress the injustices confronting indigent defendants. In *Powell*, the Court held that the Due Process Clause of the Fourteenth Amendment of the Constitution required the appointment of counsel for an indigent on trial for a capital offense. In establishing the importance of the defense counsel to our adversary system of justice, the Court observed:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate,

2. *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *United States v. Morrison*, 449 U.S. 361, 364 (1981). See also *Herring v. New York*, 422 U.S. 853, 862 (1975) (vigorous advocacy by both the defense counsel and the prosecutor is needed to promote the ultimate objective that the guilty be convicted and the innocent go free); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (the system assumes that adversarial testing will ultimately advance the public interests in truth and fairness); *Damaska, Presentation of Evidence and Fact-Finding Precision*, 123 U. PA. L. REV. 1083, 1091 (1975).

3. See, e.g., *United States v. Cronin*, 466 U.S. 648, 657 (1984).

4. 287 U.S. 45 (1932).

or those of feeble intellect.⁵

Six years later, the Court broadened *Powell* by holding that all indigents charged with any felony in a federal proceeding had a sixth amendment right to counsel.⁶ Then, in *Gideon v. Wainwright*,⁷ the Court held that the sixth amendment right to counsel for felony trials was applicable to the states as well, through the Due Process Clause of the Fourteenth Amendment.⁸ In a trilogy of decisions that same year, the Supreme Court encouraged the use by state prisoners of federal habeas corpus petitions and collateral-type attacks on convictions.⁹ In 1972, in *Argersinger v. Hamlin*,¹⁰ the Court further expanded the right to counsel when it held that no defendant could be incarcerated, even for a misdemeanor conviction, unless he had been provided counsel to assist in his defense.¹¹

Hence, in the decade from *Gideon* to *Argersinger*, substantial new burdens were placed upon the criminal justice system. Justice Powell in his concurring opinion in *Argersinger* realized that the "decision could have a seriously adverse impact upon the day-to-day functioning of the criminal justice system."¹² Former Chief Justice Burger's concurring opinion, however, expressed confidence that the legal profession could meet the challenge: "The holding of the Court today may very well add large new burdens to a profession already overtaxed, but the dynamics of

5. *Id.* at 69.

6. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

7. 372 U.S. 335 (1963). In deciding *Gideon* the Court overturned *Betts v. Brady*, 316 U.S. 455 (1942). In *Brady*, the Court held that the right to counsel did not extend to all felony cases, but rather only to cases in which the denial of counsel would be "shocking to the universal sense of justice . . ." *Id.* at 462.

8. For a discussion of the impact of the *Gideon* Court's reliance on the Sixth Amendment, upon the increase in the number of appeals of state convictions, see *Scott v. United States*, 427 F.2d 609, 610 (D.C. Cir. 1970).

9. *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Sanders v. United States*, 373 U.S. 1 (1963). The holding in *Fay v. Noia* ensured the active involvement of the federal courts in the Protection of constitutional rights. The court, in an opinion by Justice Brennan, declared that "federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." 372 U.S. at 424. See Comment, *Federal Habeas Corpus—A Hindsight View of Trial Attorney Effectiveness*, 27 LA. L. REV. 784 (1967) (after *Gideon*, the federal courts were flooded with habeas corpus petitions from state prisoners).

10. 407 U.S. 25 (1972).

11. *Id.* at 37.

12. 407 U.S. 25, 52 (1972) (Powell, J., concurring). Justice Powell, in a concurring opinion joined by Justice Rehnquist, predicted that "backlogs", "bottle-necks", and "chaos" would result in the state courts. *Id.* at 55-56.

the profession have a way of rising to the burdens placed on it."¹³ As we shall see, the years following *Argersinger* have revealed that the Chief Justice's confidence was misplaced.

B. The Right to "Effective" Counsel

The defendant's right to challenge the *quality* of the legal assistance provided to him did not immediately follow the right to counsel granted in *Powell*.¹⁴ The Court in *Powell* had indicated that when there was an obligation to provide legal counsel to an indigent, "that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of *effective* aid in the preparation and trial of the case."¹⁵ Some courts nevertheless narrowly interpreted the holding so as to undercut the right to "effective" counsel. In *Mitchell v. United States*,¹⁶ for example, the court held that an "effective appointment" by the court was required but that "effective appointment" did not refer to the *quality* of service that counsel has rendered.¹⁷ The D.C. Circuit Court of Appeals, in *Diggs v. Welch*,¹⁸ stated: "It is clear that once competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment. All that amendment requires is that the accused shall have the assistance of counsel."¹⁹ However, by 1964, the right to effective assistance in the qualitative sense was firmly imbedded in case law.²⁰ In 1970, the Supreme Court, in *McMann v. Richardson*,²¹ clearly stated that "defendants facing felony charges are entitled to the *effective* assistance of *competent* counsel."²²

13. *Id.* at 44 (Burger, C.J., concurring). Justice Brennan, in a separate concurring opinion, encouraged law students to assist in the increased representational needs of the indigent defendant. *Id.* at 40-41 (Brennan, J., concurring).

14. There was no ancestor to the claim of ineffective assistance of counsel in English law. For a discussion of the response of English law to a defendant's claim against his trial counsel, see *Rondel v. Worsley*, 1 A.C. 191 (1969). American courts, following English tradition, had held that a lawyer's negligence and lack of skill would not lead to a reversal of conviction. See *State v. Dreher*, 137 Mo. 11, 23, 38 S.W. 567, 570 (1897) ("The decisions [of the American Courts] are too numerous to cite, but their uniform tenor is to the effect that neither ignorance, blunders, nor misapprehension of counsel not occasioned by his adversary is ground for setting aside a judgment or awarding a new trial.").

15. *Powell*, 287 U.S. at 71 (emphasis added).

16. 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

17. *Id.* at 790.

18. 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945).

19. *Id.* at 668.

20. See Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. REV. 289-92 (1964).

21. 397 U.S. 759 (1970).

22. *Id.* at 771 (emphasis added). The Court added that, "If the right to counsel guaranteed by the Constitution is to serve its purpose . . . judges should strive to maintain proper

II. The Remedy of an Appeal Based on Ineffective Assistance of Counsel

A. The Growing Number of Appeals

Gideon's mandate to the states to provide counsel to all indigents charged with felonies led to a rapid increase in the number of attorneys representing clients in criminal cases.²³ Since many of the attorneys doing this defense work had no prior criminal experience, claims of inadequate representation of counsel sharply increased.²⁴

The Supreme Court has expanded and specified the various stages of prosecution for which the defendant has the constitutional right to counsel. The Court has extended the sixth amendment right to counsel to include effective assistance during all critical stages of the proceedings against him, including: the process of custodial interrogation;²⁵ a lineup or other pre-trial identification proceeding;²⁶ a probation revocation hearing;²⁷ a preliminary hearing;²⁸ and a parole revocation hearing.²⁹ *In re Gault*³⁰ extended the right of counsel to juvenile cases, and although *Douglas v. California*³¹ guaranteed the right to counsel during the first appeal of a conviction, it was not until 1985, in *Evitts v. Lucey*,³² that the Court held there was a guarantee of *effective* assistance of counsel on that same appeal. The additional burdens and duties imposed on counsel led to an increase in ineffective assistance claims.

The increasing complexity of defense work has been another factor leading to a growing number of ineffective assistance claims.³³ As a com-

standards of performance by attorneys who are representing defendants in criminal cases in their courts." *Id.*

23. See BEANY, *THE RIGHT TO COUNSEL, THE RIGHTS OF THE ACCUSED IN LAW AND ACTION* 147, 166-67 (S. Nagle ed. 1972); see also *Johnson v. City Comm'n of Aberdeen*, 272 N.W.2d 97, 100 (S.D. 1978) (appointments of counsel increased five-fold in the nine years between the *Gideon* and *Argersinger* decisions).

24. See Strazella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 445 (1977).

25. *Miranda v. Arizona*, 384 U.S. 436 (1966).

26. *United States v. Wade*, 388 U.S. 218 (1967).

27. *Mempa v. Rhay*, 389 U.S. 128 (1967).

28. *Coleman v. Alabama*, 399 U.S. 1 (1970).

29. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

30. 287 U.S. 1 (1967).

31. 372 U.S. 353 (1963).

32. 105 S. Ct. 830 (1985). Justice Brennan, writing for the majority, held that the right to an effective lawyer is one of the procedural protections that must be given to a defendant if the state permits a defendant to appeal his conviction. *Id.* at 836.

33. A survey of the number of claims of incompetent counsel, comparing reported opinions in the federal circuit courts of appeals in the years 1963-1965, with the years 1969-1971, revealed a 262% increase in ineffective assistance claims. Strazella, *supra* note 24, at 445 n.8.

petent attorney has more to do, there is greater risk of default. In this regard, the court in *State ex rel. Partain v. Oakley*³⁴ observed:

Today, the defense lawyer in a criminal case is confronted with a myriad of fine points in which he must deal. The modern criminal lawyer must engage in complicated and detailed pretrial discovery, analysis of involved issues of search and seizure, occasional scientific jury selection, elaborate rules relating to conspiracy, and in addition he must be conversant with the forensic sciences, medicine, psychiatry and other disciplines unrelated to the practice of law. Not only is the lawyer currently required to deal with these convoluted and diverse legal and non-legal matters but the prospects for additional intricacies in the future are almost inescapable.³⁵

The responsibilities of counsel also include the duty to: (1) competently and fully advise the client during plea negotiations;³⁶ (2) explore all legally justifiable motions, including those for a reduction in bail;³⁷ and (3) examine any possible psychiatric defenses and insure that the defendant is mentally competent to proceed with the case.³⁸ An attorney must not only inform his client of the right to take a direct appeal,³⁹ but is obligated to explain that the defendant, if he is unable to afford counsel, will be provided with state-appointed counsel for that appeal.⁴⁰

In addition to a direct appeal claiming ineffectiveness of counsel, convicted defendants, after exhausting their appeals in state court, can petition a federal district court for a writ of habeas corpus to collaterally attack the conviction. Such an action would typically allege that the conviction was obtained without due process of law because the attorney did not provide effective assistance of counsel, and the defendant was thereby deprived of his constitutional rights.⁴¹

34. 227 S.E.2d 314 (W.Va. 1976).

35. *Id.* at 322.

36. *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970); *Fitzgerald v. Beto*, 479 F.2d 420 (5th Cir. 1973), *rev'd on other grounds sub nom. Fitzgerald v. Estelle*, 505 F.2d 1334 (5th Cir. 1975).

37. *State v. Watson*, 134 Ariz. 1, 653 P.2d 351 (1982).

38. *United States v. Edwards*, 488 F.2d 2254 (5th Cir. 1974); *People v. McDonnell*, 91 Mich. App. 458, 283 N.W.2d 773 (1979).

39. *See, e.g., Goodwin v. Cardwell*, 432 F.2d 521 (6th Cir. 1970).

40. *United States ex rel. Smith v. McMann*, 417 F.2d 648 (2d Cir. 1969).

41. 28 U.S.C. § 2254(d) (1982) requires a federal court to presume the validity of the state court's factual findings, but the issue of whether the lawyer's conduct violated the defendant's constitutional rights is a mixed determination of law and fact requiring the application of legal principles to the facts of the case. *See Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980). *See also Townsend v. Sain*, 372 U.S. 293, 309 n.6, 318 (1963) (the factual determinations made by state courts which the federal courts must presume to be correct, do not include mixed questions of fact and law). The district court considering the writ can hold an evidentiary hearing examining not only the trial record, but other evidence as well. Some state courts have therefore

B. Obstacles to Proving a Claim of Ineffective Assistance

There are, however, obstacles to proving a claim of ineffective assistance. An analysis of approximately 4,000 federal and state reported appellate decisions regarding claims of ineffective assistance between 1970 and 1983 showed that only 3.9% resulted in a finding of ineffective counsel.⁴² First, although the defendant might like to invoke the attorney-client privilege to prevent his trial attorney from explaining why, for example, he did not attempt to contact alleged alibi witnesses, courts routinely hold that once a defendant has commenced his ineffective assistance of counsel claim, he has waived the attorney-client privilege.⁴³ The Model Code of Professional Responsibility,⁴⁴ the Model Rules of Professional Conduct,⁴⁵ and the American Bar Association Standards for Criminal Justice⁴⁶ all permit the attorney, when the quality of his representation is being attacked by his former client, to reveal matters which may have been told him in confidence. The trial attorney who is most frequently a government witness and conscious of how any testimony admitting ineffective representation might affect a malpractice action or disciplinary hearing, may, therefore, become an adversary, trying to defeat his former client's claim on appeal.⁴⁷

deferred to the habeas proceeding because the district court is not bound to limit itself to a mere review of the trial record. See *People v. Pope*, 23 Cal. 3d 412, 428, 590 P.2d 859, 868-69, 152 Cal. Rptr. 732, 741-42 (1979). Other courts have viewed the collateral attack as "placing the very integrity of a state's criminal proceeding in question." *Langley v. State*, 256 Ind. 199, 204, 267 N.E.2d 538, 540-41 (1971). For an analysis of recent proposals to restrict a defendant's access to habeas corpus review of state convictions, see Smith, *Federal Habeas Corpus—A Need for Reform*, 73 J. CRIM. L. AND CRIMINOLOGY 1036 (1982); see also, Torbert, *Overly-Broad Application of Federal Habeas Corpus*, 43 ALA. L. REV. 22 (1982); Peller, *In Defense of Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982). When the trial record clearly contains sufficient information on which to assess the claim of ineffective assistance, it may be preferable to litigate the claim on direct appeal. See Brody & Albert, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROBS. 1, 87 (1977); Strazella, *supra* note 24, at 460; Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 939-40 n.66 (1973).

42. Brief of Amici Curiae, National Legal Aid and Defender Association [NLADA], The Association of Trial Lawyers of America, and the American Civil Liberties Union, at 22, in *United States v. Cronin*, 466 U.S. 648 (1984). The research was funded by the American Bar Association, Bar Information Program of the Standing Committee on Legal Aid and Indigent Defendants, and conducted by NLADA. *Id.* at 19.

43. See, e.g., *State v. Tucker*, 97 Idaho 4, 12, 539 P.2d 556, 564 (1975).

44. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(4) (1981).

45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983).

46. STANDARDS FOR CRIMINAL JUSTICE Standard 4-8.6(c) (1980 & Supp. 1986).

47. The dilemma of the attorney in a hearing to assess his own ineffectiveness of counsel was noted by the Ninth Circuit in *Kuhl v. United States*, 370 F.2d 20 (9th Cir. 1966). The court described the attorney as being "in the unenviable position where, if he can recall his reasons and they are good, he is hurting his former client, and if he can recall his reasons and

Some courts had taken the position that there must be the state act of appointment of counsel in order to create a violation of the Due Process Clause of the Fifth and Fourteenth Amendments. Consequently, these courts would not reverse on the grounds of ineffective assistance of counsel when counsel had been retained by the defendant himself.⁴⁸ The courts reasoned that retained counsel was the defendant's agent rather than the agent of the state, and that the defendant, therefore, was bound by his attorney's acts and omissions. The adamant attitude of these courts is reflected in the Tenth Circuit Court of Appeals' denial of a claim of ineffective assistance:

The most that can be said for this testimony is that it establishes that appellee's counsel drank throughout the trial and that he was under the influence of intoxicating liquor to a greater or lesser degree during the whole trial. But what of it? Appellee employed him; he paid him a substantial fee, and had a right to his services if he desired them, even though he might have been under the influence of intoxicants.⁴⁹

In 1980, however, the Supreme Court in *Cuyler v. Sullivan*⁵⁰ made it clear that the right to effective counsel applies to all defendants, and not just to those with counsel appointed by the court.⁵¹

The general reluctance of state appellate courts to reverse convictions on grounds of ineffective assistance of counsel presents an obstacle to defendants making such a claim. Former Chief Judge Bazelon noted that: "One of the major reasons that the problem of ineffective assistance has remained hidden is the appellate courts' remarkable propensity to ignore the issue of ineffective assistance altogether and to paper over the cracks in the house that Gideon built."⁵² The primary reason appellate

they are bad, or even not very good, he is impugning his own professional competence." *Id.* at 27.

48. See, e.g., *Hendricksen v. Overlade*, 131 F. Supp. 561 (N.D. Ind. 1955); *Rice v. Davis*, 366 S.W.2d 153 (Ky. Ct. App. 1963); *People v. Fryson*, 36 Misc.2d 73, 232 N.Y.S.2d 224 (N.Y. Sup. Ct. 1962).

49. *Hudspeth v. McDonald*, 120 F.2d 962, 967 (10th Cir.), *cert. denied*, 314 U.S. 617 (1941). See *United States ex rel. Darcy v. Handy*, 203 F.2d 407, 426 (3d Cir.) (en banc) (Maris, J., concurring), *cert. denied*, 346 U.S. 865 (1953) ("When counsel is retained by a defendant to represent him in a criminal case he acts in no sense as an officer of the state."); see also *United States v. Butler*, 167 F. Supp. 102 (E.D. Va. 1957), *aff'd*, 260 F.2d 574 (4th Cir. 1958) (no reversal where the lawyer was addicted to narcotics use during the trial); *People v. Schiers*, 160 Cal. App. 2d 364, 324 P.2d 981 (1958), *rev'd on other grounds*, 19 Cal. App. 3d 102, 96 Cal. Rptr. 330 (1971) (no reversal where the lawyer was actually physically ill during the conduct of the trial).

50. 446 U.S. 335 (1980).

51. *Id.* at 344-45.

52. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973) [hereinafter cited as Bazelon, *Defective Assistance*]. Judge Bazelon has written of his own court: "I have

courts give for denying ineffective assistance claims is that the court does not wish to second-guess a lawyer's decisions concerning proper trial strategy or tactics.⁵³ Court decisions specifically warn against the dangers in using hindsight to review counsel's conduct.⁵⁴ As the court in *Rodriguez v. State*⁵⁵ observed, courts are slow to express a negative opinion as to "whether a licensed member of the bar, authorized to practice law in this state, is competent to do so, or has adequately represented and protected the rights of a client. . . ."⁵⁶ As a result, courts have not found ineffective assistance in cases where the defense counsel has failed to produce for trial a material witness for the defendant,⁵⁷ has failed to raise certain appropriate defenses to rebut the prosecution's case,⁵⁸ or has made errors in judgment in the process of representing the defendant.⁵⁹

It is, however, highly questionable whether a defendant who was convicted as a result of his lawyer's poor judgment ought not be able to have that conviction overturned or at least carefully examined. Yet, labelling a lawyer's performance errors as mistakes in "strategy" or "tactics" deems those errors to be, by definition, unreviewable. Lawyers are hired and assigned not exclusively for their technical expertise, but also for their ability to exercise sound professional judgment and to know when and how to apply their skills. A prime component of competent representation is the proper exercise of the "judgment call", and courts ignoring prejudicial, improper omissions or actions because they are deemed to fall under that characterization do a gross disservice to the unfortunate client.

Courts, in expressing their reluctance to reverse convictions, have shown concern that were an appeal to be granted on the grounds that counsel was ineffective, members of the bar would be discouraged from

often been told that if my court were to reverse every case in which there was inadequate counsel, we would have to send back half of the convictions in my jurisdiction." *Id.* at 22-23.

53. See, e.g., *Watkins v. State*, 560 P.2d 921 (Nev. 1977); *People v. Johnson*, 45 Ill. App. 3d 255, 359 N.E.2d 791 (1977). For a Circuit Court of Appeals decision giving the same rationale, see *United States v. Housewright*, 568 F.2d 516 (7th Cir. 1977). But see *Pineda v. Craven*, 424 F.2d 369, 372 (9th Cir. 1970) (the Ninth Circuit's response to a lawyer's claim that his conduct did not constitute ineffective assistance, but rather was a tactical choice, was that "[t]here is nothing strategic or tactical about ignorance . . .").

54. See, e.g., *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974); *United States v. Robinson*, 502 F.2d 894, 896 (7th Cir. 1974).

55. 170 Tex. Crim. 295, 340 S.W.2d 61 (Tex. Crim. App. 1960).

56. *Id.* at 296, 340 S.W.2d at 62.

57. *Hoffler v. Peyton*, 207 Va. 302, 311, 149 S.E.2d 893, 899 (1966) (the court termed such failure "merely an error of judgment which does not constitute lack of effective representation of counsel"). See also *Abbot v. Peyton*, 329 F. Supp. 1310 (W.D. Va. 1971).

58. *State v. Eby*, 342 So. 2d 1087 (Fla. Dist. Ct. App. 1977).

59. *People v. Carter*, 41 Ill. App. 3d 425, 354 N.E.2d 482 (1976).

taking on the defense of criminal defendants.⁶⁰ Other reasons given by courts for hesitating to find ineffective assistance include: (1) a fear that defendants' successes would lead to an increase in cases for the already overburdened appellate courts;⁶¹ (2) the policy of "finality" of judgment,⁶² which finds additional support at present by politicians' calls for swift and certain punishment for those convicted of crimes;⁶³ and (3) a fear that reversing convictions based on ineffective assistance could have an adverse effect on prison discipline.⁶⁴

To compound the obstacles facing the defendant, appellate courts must rely on the official record of the proceeding and, unlike the federal district court reviewing a habeas petition, they cannot usually conduct an evidentiary hearing to enable the defendant to more clearly explain the failings of counsel. The trial record on which an appeals court must rely may well have been insufficiently developed by the same attorney whom the defendant claims has been an ineffective representative.⁶⁵

Moreover, a certain cynicism on the part of the courts to the claim of a convicted defendant is not uncommon,⁶⁶ and can be noted in the following decision:

Convicts are not subject to the deterrents of prosecution for perjury and contempt of court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction

60. See *Williams v. Beto*, 354 F.2d 698, 704-06 (5th Cir. 1965); *Mitchell v. United States*, 259 F.2d 787, 793 (D.C. Cir.), cert. denied, 358 U.S. 850 (1959) (there can be no inquiry into the quality of services given, or else lawyers would not accept assignments to represent indigent defendants); *Norman v. United States*, 100 F.2d 905 (6th Cir.), cert. denied, 306 U.S. 660 (1939).

61. *Mitchell v. United States*, 259 F.2d at 793.

62. See *Bines*, *supra* note 41, at 929. The Court in *Strickland v. Washington*, 466 U.S. 668 (1984), observed that: "[T]he presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." *Id.* at 697.

63. *Carvell v. United States*, 173 F.2d 348 (4th Cir. 1949).

64. Chief Justice Bird of the California Supreme Court explained in a decision denying a defendant's appeal:

In view of the silence of the record on the reasons why no mental defense was presented, appellant's claim would be more appropriately made in a petition for habeas corpus. Indeed, if presented in a verified petition, appellant's allegation concerning the substantial mental defenses which were not offered would undoubtedly present a colorable claim entitling appellant to an evidentiary hearing. At such a hearing, appellant would be able to produce evidence on matters merely alleged before this court.

People v. Pope, 23 Cal. 3d 412, 428, 590 P.2d 859, 868-69, 152 Cal. Rptr. 732, 741-42 (1979). See also *People v. Piper*, 103 Cal. App. 3d 102, 162 Cal. Rptr. 833 (1980).

65. See *Waltz*, *supra* note 20, at 290.

66. See, e.g., *Sayre v. Commonwealth*, 194 Ky. 338, 342-44, 238 S.W. 737, 739 (1922), where the court declared that a defendant may not sit idly by while his counsel presents false defenses and then, after a guilty verdict, throw himself upon the mercy of the court because of his counsel's lack of skill.

to a disappointed prisoner. . . . He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. To allow a prisoner to try the issue of the effectiveness of his counsel . . . is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near penal institutions would be compelled to hear.⁶⁷

Chief Judge Bazelon described the attitude of the appellate courts as follows: "It is the belief—rarely articulated, but I am afraid, widely held—that most criminal defendants are guilty anyway. From this assumption it is a short path to the conclusion that the quality of representation is of small account."⁶⁸

To a certain extent, the collegiality of the legal profession—most judges were once practicing attorneys themselves—also inhibits courts from taking action which may be viewed as a condemnation of an attorney's performance,⁶⁹ or of the trial judge's supervision.⁷⁰ Courts, for example, have attempted to preserve the reputation of an attorney by not using the attorney's name when finding ineffective assistance.⁷¹ *Finger v. State*⁷² exemplifies how unacceptable it may seem to a lawyer to be perceived of as criticizing another lawyer. In *Finger*, the lawyer, representing a defendant on an appeal based in part on the claim of ineffective assistance, made a motion to the Indiana Supreme Court for a rehearing. The motion was based on counsel's being "critical" of the earlier Supreme Court decision for "having identified him as the appellate counsel" who had alleged that the trial attorney had been ineffective, and further charged the court with "judicial indiscretion" in identifying the trial counsel by name.⁷³

There is little likelihood that an attorney who represented a defendant at trial will raise the issue of ineffectiveness when representing that

67. *Diggs v. Welch*, 148 F.2d 667, 670 (D.C. Cir. 1945).

68. Bazelon, *Defective Assistance*, *supra* note 52, at 26.

69. See *State v. Dreher*, 38 S.W. 567, 571 (Mo. 1897) (labeling of a lawyer's work as ineffective is a condemnation of his professional status without a hearing). Claims of ineffective assistance may be viewed as an attack on the profession itself, and the judicial members of the profession may hesitate to act in ways critical of other members.

70. See McGee, *Defense of Indigents: Current Status*, 29 ALA. LAW 408, 425-26 (1968) (to uphold the claim of ineffectiveness condemns not only the defense attorney but also would in some instances "censure the trial judge, and even the prosecutor, for failure to do justice").

71. See, e.g., *United States v. Re*, 336 F.2d 306 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964) (referring in its opinion to the attorney as "Mr. Z."). But see *United States v. Katz*, 425 F.2d 928, 931 n.3 (2d Cir. 1970) (Judge Friendly expressed his gratitude to the appellate counsel "for his vigorous undertaking of the distasteful task of criticizing a brother lawyer on Katz' behalf").

72. 260 Ind. 524, 297 N.E.2d 819 (1973).

73. *Id.* at 525, 297 N.E.2d at 820.

same defendant on appeal. Yet, even when the appellate lawyer works in a different division of the same office as the trial attorney, as is the case in many large, urban legal aid and public defender offices, that association may well hinder the new attorney's diligent pursuit of an appeal on grounds of ineffective assistance. It is difficult for an appellate attorney to maintain that the same office which employs him failed to provide constitutionally satisfactory representation at the trial level, and it is awkward and discomfiting to ask the assigning judge to relieve him on those grounds.⁷⁴ However reluctant the lawyer may be, the ethical obligation of the appellate lawyer to pursue a warranted appeal on ineffective assistance grounds is clear.⁷⁵

Another major problem prevents defendants from obtaining relief when they have had ineffective counsel. Appellate counsel generally have the same heavy caseload as trial attorneys, and consequently, a thorough, well-prepared, adequate appeal is often not achieved.⁷⁶ In ad-

74. For an analysis of the ethical duty of an appellate lawyer who perceives a valid ineffective assistance of counsel claim against a trial lawyer who works in the same office, see Webster, *The Public Defender, The Sixth Amendment, and the Code of Professional Responsibility: The Resolution of a Conflict of Interest*, 12 CRIM. L. REV. 739 (1975).

75. The ABA Standards for Criminal Justice, *supra* note 46, are unequivocal. Standard 4-8.6(a) states: "If a lawyer, after investigation, is satisfied that another lawyer who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the defendant on that ground." The Commentary elaborates on the import of the responsibility:

Nothing would be more destructive of the goals of effective assistance of counsel and justice than to immunize the misconduct of a lawyer by the unwillingness of other lawyers to expose the inadequacy. Lawyers must be especially careful to avoid permitting their personal regard for a fellow lawyer to blind them to that lawyer's failure to provide the effective assistance to which every defendant is entitled as a matter of constitutional right.

Id. Additionally, Canon 7 and Ethical Considerations 7-4 and 7-9 of the Model Code of Professional Responsibility, *supra* note 44, have been cited for the proposition that "it [is] counsel's solemn duty . . . to present the issue of trial counsel's competence" to the appellate court. *Finger v. State*, 260 Ind. 524, 525, 297 N.E.2d 819, 820 (1973).

76. An examination of the quality of appellate advocacy in the Circuit Courts of Appeal found that the factor believed by judges to be the most frequent cause of inadequacy was the "failure by lawyers to research their cases and prepare themselves to the best of their ability." A. PARTRIDGE & G. BERMANT, *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS* 8 (1978) [hereinafter cited as PARTRIDGE & BERMANT]. A study by the National Defender Institute, NATIONAL DEFENDER INSTITUTE, *EVALUATION OF FOUR COUNTY PUBLIC DEFENDER PROJECTS FOR THE EIGHT B JUDICIAL DISTRICT, IOWA* (1979), reported in LEFSTEIN, *CRIMINAL DEFENSE SERVICES FOR THE POOR—METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING*, ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS Appendix F-18 (May 1984), found that "appellate cases are assigned to defenders who already have a full trial load." See also CRIMINAL DEFENSE TECHNICAL ASSISTANCE PROJECT OF ABT ASSOCIATES, INC., *THE PUBLIC DEFENDER SYSTEM IN MARION COUNTY, INDIANA* (1980), reported in LEFSTEIN, at Appendix F-16 (the assessment found that the quality of representation, especially in appellate cases, was unsatisfactory); NATIONAL CENTER FOR DEFENSE MANAGEMENT,

dition, underfinancing and understaffing of appeals units in defender offices create such delays in processing appeals that prisoners may have served their sentences before their appeals are even heard.⁷⁷

III. What Constitutes Ineffective Assistance of Counsel

A. Interference by the Trial Court

Reversals of convictions have frequently occurred upon a finding that the trial court itself had been responsible for inhibiting counsel's representation. Defendants' claims, for example, have succeeded when the court refused to allow the lawyer to give a summation at a bench trial;⁷⁸ prohibited the lawyer from consulting with his client during the overnight recess;⁷⁹ required the defendant to testify first, before other defense witnesses, or not at all;⁸⁰ denied the defendant counsel at arraignment;⁸¹ prevented the lawyer from consulting with the defendant before cross examination began;⁸² and forced counsel to trial with such speed as to preclude effective assistance.⁸³ In these cases, the denial of due process under the Fourteenth Amendment is paramount, and the defendant is not required to show that the *outcome* of the trial was affected by the trial court's improper action.

B. Failure of Counsel to Exercise the Skill of a Reasonably Competent Attorney

Ineffective assistance also occurs when a lawyer has failed to exercise the skill of a reasonably competent attorney so that the defendant was denied his sixth amendment right. The courts have found ineffective representation where the lawyer failed to put forth a valid, viable defense;⁸⁴ request an appropriate charge to the jury which was favorable to

EVALUATION OF THE CALIFORNIA STATE PUBLIC DEFENDERS (1979), *reported in* LEFSTEIN, at Appendix F-6 ("In appellate cases involving private assigned counsel, low compensation contributes to ineffective representation.").

77. See, e.g., COMMITTEE ON CRIMINAL ADVOCACY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *THE CRISIS IN INDIGENT APPEALS IN THE FIRST AND SECOND DEPARTMENTS* (April 1985) (briefs are not filed until almost eight months after lawyers receive the transcript, and the result of the delay is to effectively deny indigents their right of appeal); *Gaines v. Manson*, 195 Conn. 510, 481 A.2d 1084 (1984) (insufficient staffing of the public defender office in processing appeals caused delays of two to four-and-a-half years).

78. *Herring v. New York*, 422 U.S. 853 (1975).

79. *Geders v. United States*, 425 U.S. 80 (1976).

80. *Brooks v. Tennessee*, 406 U.S. 605 (1972).

81. *Hamilton v. Alabama*, 368 U.S. 52 (1961).

82. *Geders v. United States*, 425 U.S. 80 (1976).

83. *White v. Ragen*, 324 U.S. 760, 764 (1945).

84. *United States ex rel. Green v. Rundle*, 434 F.2d 1112 (3d Cir. 1970); *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982).

the defense;⁸⁵ properly investigate contradictory statements made by the prosecution's witnesses and to call witnesses which could have raised doubts regarding the occurrence of the crime;⁸⁶ file necessary motions to suppress illegally seized evidence;⁸⁷ effectively participate in the selection of a jury;⁸⁸ adequately cross-examine witnesses;⁸⁹ avoid eliciting information on cross-examination that was damaging to his client's case, even after having been cautioned by the trial judge;⁹⁰ and be sufficiently involved in the trial proceedings.⁹¹

Reversals on ineffective assistance grounds have also resulted from a trial lawyer's lack of awareness of applicable statutes and provisions of the law. In *People v. Ibarra*,⁹² for example, the court found that the trial was reduced to a farce because the lawyer was unaware that the defendant could have challenged the legality of a search while simultaneously denying any proprietary interest in the entered premises. In *Roberts v. United States*,⁹³ the court reversed the conviction when the lawyer was misinformed about the existence of a requirement of a mandatory special parole term upon the defendant's entry of a plea. Other examples include *In re Williams*,⁹⁴ in which the lawyer had advised his client to plead guilty to a forgery charge when, in fact, the only charge proper for prosecution was the lesser charge of misuse of credit cards, and *Wilson v. Reagan*,⁹⁵ in which the lawyer, unaware that the court had the authority to impose a sentence of probation instead of jail, had failed to request the probationary sentence for his client.

IV. Recent Decisions Limiting Claims Based on Ineffective Assistance of Counsel

In three recent cases, the United States Supreme Court has seriously undermined the remedy available to a defendant receiving ineffective representation.

85. *Taylor v. Starnes*, 650 F.2d 38, 41 (4th Cir. 1981); *Harris v. Housewright*, 697 F.2d 202 (8th Cir. 1982).

86. *Garza v. Wolff*, 528 F.2d 208 (8th Cir. 1975).

87. *Pineda v. Craven*, 424 F.2d 369 (9th Cir. 1970); *United States v. Easter*, 539 F.2d 663 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977).

88. *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977).

89. *United States v. Clayborne*, 590 F.2d 473 (D.C. Cir. 1974).

90. *People v. Nitti*, 312 Ill. 73, 143 N.E. 448 (1924).

91. *United States v. Hammonds*, 425 F.2d 597 (D.C. Cir. 1970).

92. 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

93. 491 F.2d 1236 (3d Cir. 1974).

94. 1 Cal. 3d 168, 460 P.2d 984, 81 Cal. Rptr. 784 (1969).

95. 354 F.2d 45 (9th Cir. 1965).

A. *Strickland v. Washington*

In *Strickland v. Washington*,⁹⁶ the Court held that even if counsel's performance was deficient and the errors made were so serious that counsel was not functioning as guaranteed by the Sixth Amendment, a conviction should not be reversed unless the defendant shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁹⁷ The Court set forth a two-prong test that must be met before a conviction will be overturned based upon ineffective assistance of counsel. The defendant must show: (1) deficient performance by the trial attorney; and (2) that the deficient performance resulted in sufficient prejudice to the defendant.

The Court, in discussing the first prong of the required two-prong test, sent a clear message to lower courts that there is a strong presumption that counsel's conduct was constitutionally adequate.⁹⁸ The Court asserted:

Judicial scrutiny of counsel's performance must be *highly deferential*. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [T]he defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."⁹⁹

Courts do not follow a "highly deferential" standard of review when evaluating the work of other professions.¹⁰⁰ Nor is there any "strong presumption"¹⁰¹ that the professional acted reasonably.¹⁰² The standard is "reasonable professional competence" for malpractice suits against

96. 466 U.S. 668 (1984).

97. *Id.* at 694.

98. *Id.* at 690-91.

99. *Id.* at 689 (citation omitted) (emphasis added).

100. It is perhaps somewhat ironic that lawyers who so actively litigate and accuse other professionals (especially doctors) of failing to perform appropriately, are themselves afforded such a presumption of competence.

101. The *Strickland* Court noted that in evaluating an ineffective assistance of counsel claim, "a court must indulge a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689 (emphasis added).

102. Justice Marshall, in his dissent, noted that "by 'strongly presuming' that [the defense attorney's] behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel." *Id.* at 713 (Marshall, J., dissenting).

physicians and surgeons,¹⁰³ accountants,¹⁰⁴ and architects.¹⁰⁵ Certainly the harm and loss of liberty resulting to a defendant because of an incompetent attorney may be far greater than the damage done to a client of a negligent accountant or architect.

The federal courts promptly adopted the new standards of review set out in *Strickland*. The Fifth Circuit, in *Ricalday v. Proconier*,¹⁰⁶ ruled that the standards were immediately applicable even though *Strickland* had not been decided at the time the defendant's counsel represented him at trial, or when the direct appeal was heard, or when the district court ruled on the habeas petition. The Fifth Circuit proceeded to hold that even though counsel's error was an egregious one which was not within the wide range of professionally competent assistance, the conviction ought not be overturned because the defendant failed to show a reasonable probability that the factfinder would have acquitted the defendant had the attorney not been deficient in his representation of his client.¹⁰⁷

For a court to be required to engage in speculation about how the trial might have gone if counsel had been an effective advocate is to minimize the importance of the sixth amendment right to counsel, and the adversary system itself will suffer.¹⁰⁸ The absence of effective representation may well have had an effect on the entire proceeding that was so pervasive that it is not possible to accurately determine the degree of prejudice. How can an appellate court determine, for example, what information a well-carried out investigation would have yielded,¹⁰⁹ or how effective an insanity defense could have been if counsel would have had a

103. *Incollingo v. Ewing*, 444 Pa. 263, 282 A.2d 206 (1971).

104. *O'Neill v. Atlas Automobile Finance Corp.*, 139 Pa. 346, 11 A.2d 782 (1940).

105. *Bloomsburg Mills, Inc. v. Sordini Construction Co., Inc.*, 401 Pa. 358, 164 A.2d 201 (1960).

106. 736 F.2d 203 (5th Cir. 1984).

107. *Id.* at 209.

108. In *McQueen v. Swenson*, 498 F.2d 207, 218-19 (8th Cir. 1974), the court noted that inadequate representation is "not the product of an adversary, but a flaw in the adversary process."

109. In *Powell v. Alabama*, the Supreme Court, in discussing the adequacy of the representation provided by the defense attorneys appointed to represent the defendant, noted: "It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. *Neither they nor the Court could say what a prompt and thoroughgoing investigation might disclose as to the facts.*" 287 U.S. 45, 58 (1932) (emphasis added). See also *United States v. Tucker*, 716 F.2d 576, 593 (9th Cir. 1983) (when investigation and preparation of the case by counsel is inadequate, it follows that the record is necessarily incomplete as to the extent of prejudice which resulted from the attorney's failings); cf. *Michel v. Louisiana*, 350 U.S. 91, 100-01 (1955); *White v. Ragen*, 324 U.S. 760, 762 (1945).

psychiatrist examine his client?¹¹⁰

In addition, juries evaluate many subjective, as well as objective, factors that bear on determining witness-credibility, and may well have been influenced in ways that a court reviewing the cold, written record could not determine. An effective attorney, having properly investigated the case, may have been able to cross-examine the crucial prosecution witness in a manner that would have impacted on the witness' credibility and demeanor in ways the reviewing court could never ascertain. The ineffectiveness of counsel, for example, in not investigating, seeking out, and interviewing possible defense witnesses, may well be the very reason that the record will not reflect prejudice for review.¹¹¹

And what can be the response to the defendant who was denied relief even though his counsel was found to be clearly ineffective? The Presidential Commission on Law Enforcement and the Administration of Justice noted that "[f]air treatment of every individual—fair in fact and also *perceived to be fair by those affected*—is an essential element of justice and a principal objective of the American criminal justice system."¹¹²

The most ominous portion of the *Strickland* decision, however, indicates the Court's apparent desire to inhibit careful judicial review and to discourage courts from granting relief based on claims of ineffective representation of counsel:

The availability of *intrusive post-trial inquiry* into attorney performance or of detailed guidelines for its evaluation would *encourage the proliferation of ineffectiveness challenges*. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to

110. In *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985), the Supreme Court held that the state must provide a psychiatric expert for a defendant unable to afford one if a preliminary showing has been made that the defendant's sanity is likely to be a significant factor at the trial.

111. In *Holloway v. Arkansas*, 435 U.S. 475 (1978), the Court seemed fully aware of the dangers involved in relying upon the record to show prejudice. In rejecting the government's argument that the defendant need show prejudice when represented by an attorney also representing the co-defendant, the Court stated:

[T]he evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing; not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client.

Id. at 490-91 (emphasis added).

112. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* viii (1967) (emphasis added).

serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.¹¹³

Does the Court here admit that representation by counsel is frequently ineffective and could not withstand close scrutiny? Or does the Court somehow assume that any proliferation of cases would present claims without merit, even though there seems to be a number of counsel so deluged with cases that they are simply unable to provide effective assistance?¹¹⁴ Former Chief Justice Burger, while joining the majority in *Strickland*, has frequently lectured and written about his concern for the lack of competence and the poor quality of representation provided by trial attorneys.¹¹⁵ The former Chief Justice is by no means alone; other high-ranking judges have sharply criticized attorneys' low level of competency.¹¹⁶ But for whatever reason the Court feared a proliferation of

113. *Strickland*, 466 U.S. at 690 (emphasis added). The Court, bringing the message home once more, cautioned that "[t]here are countless ways to provide effective assistance in any given case" and "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689.

114. See *infra* text accompanying notes 174-265. Perhaps the main reason for any "proliferation of challenges" is the proliferation of instances in which counsel was not able to provide effective representation.

115. See, e.g., Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227 (1973), where the Chief Justice noted that "it is the observation of judges that the Criminal Justice Act has not brought about improvement in the general quality of criminal defense and that performance has not been generally adequate—either by assigned private counsel or by the public defender office." *Id.* at 237. The results of a questionnaire sent out by the Federal Judicial Center in 1977 to all 476 federal district judges lends support to Chief Justice Burger's comments. In answer to the question, "Do you believe there is, overall, a serious problem of inadequate trial advocacy by lawyers with cases in your court?", 41% of the 366 respondents replied, "Yes." *PARTRIDGE & BERMANT, supra* note 76, at 30-43. The most frequent consequence of this inadequacy, cited by more than half the respondents, was a failure to fully protect the client's interests. *Id.* at 16. Moreover, 33% of judges surveyed reported a "serious problem" of inadequate advocacy by appointed criminal defense counsel in federal court. *Id.*; see also, *THE FINAL REPORT OF THE COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES* 1 (1979) (concluding that there is a significant problem in the quality of trial advocacy in the federal courts).

116. These judges include: the former Chief Judge Bazelon of the United States Court of Appeals, District of Columbia Circuit; the former Chief Judge Kaufman of the United States Court of Appeals for the Second Circuit; Judge Wilkey of the United States Court of Appeals, District of Columbia Circuit; Judge Schwarzer of the Northern District of California; and Justice Erickson of the Colorado Supreme Court. See Bazelon, *Defective Assistance, supra* note 52; Bazelon, *The Realities of Gideon and Argersinger*, 64 *GEO. L.J.* 811 (1976) [hereinafter cited as Bazelon, *Realities*]; Kaufman, *Attorney Incompetence: A Plea for Reform*, 69 *A.B.A. J.* 308 (1983); Kaufman, *Does the Judge Have the Right to Qualified Counsel?*, 61 *A.B.A. J.* 569

ineffectiveness challenges, that fear alone is no reason to relax the constitutional protection of the right to counsel. The Court, for example, when deciding in *Brown v. Board of Education*¹¹⁷ that separate educational facilities were inherently unequal, was not deterred by the concern that such a finding would result in a proliferation of new court cases challenging separate but equal public facilities.¹¹⁸

Another way in which *Strickland* undermines the right to effective assistance of counsel is the Court's implication that effective assistance may not be required when there is a very strong case against the defendant: "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."¹¹⁹ When the prosecutor has a powerful case against the defendant, courts applying *Strickland* may find that, regardless of how incompetent and inadequate the representation was, the verdict would have been the same.¹²⁰ In these cases, there will be no remedy for the defendant who has been convicted without the effective assistance of counsel, because only the defendant who can illustrate to the reviewing court that he may have otherwise been acquitted, is awarded a remedy for ineffective assistance.¹²¹ The Court indicated it would not even be necessary to "grade counsel's per-

(1975); Wilkey, *A Bar Examination for Federal Courts*, 61 A.B.A. J. 1091 (1975); Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980); Erickson, *Standards for Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979).

117. 347 U.S. 483 (1954).

118. The Court in the years immediately following *Brown* was indeed confronted with such challenges, and proceeded to hold segregation invalid in a variety of settings. See, e.g., *New Orleans City Park Development Association v. Detiege*, 358 U.S. 54 (1958) (public parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (city golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public bathhouses and beaches).

119. *Strickland*, 466 U.S. at 695.

120. The doctrine of harmless error prohibits appellate reversals based on errors deemed not to affect the defendant's substantial rights. The Supreme Court first extended the principle of harmless error to constitutional concerns in *Chapman v. California*, 386 U.S. 18, 22 (1967), where the Court noted that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless. . . ." In *Chapman*, the Court held that where there has been an error at a trial that affected one's constitutional rights, the burden is on the state to prove beyond a reasonable doubt that the error was harmless. *Id.* at 24. Furthermore, the *Chapman* Court clearly did not envision the denial of effective assistance as constituting harmless error. The Court, citing the right to counsel established in *Gideon v. Wainwright*, declared: "[O]ur prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23.

121. The Court certainly appears to have gone a long way toward accepting Judge Friendly's 1970 thesis that, with certain exceptions, the only time a collateral attack on a criminal conviction should prevail is when the petitioner has made a "colorable showing of

formance" when the ineffectiveness claim could easily be dismissed due to lack of sufficient prejudice.¹²² The reviewing court may conclude that the defendant was clearly guilty and be able to find "no prejudice" for the very reason that the ineffective counsel had failed to prevent the trial record from showing overwhelming evidence of guilt. When there have been the *most* egregious failings by counsel is exactly when the record may indeed be barren of any indication of reasonable doubt. Yet, it is those very situations where courts now need not even proceed to attempt to discover the failings of counsel.

It might well be, moreover, that the defendant who is confronted with a strong case against him is *most* in need of a diligent, competent, and vigorous defense. The right to adequate representation ought not hinge on the guilt or innocence of the accused. It has come to be a basic principle of our American legal system that *all* have a right to counsel, and that no one ought be deprived of liberty without a fair trial in which there was the effective assistance of counsel. *Strickland's* emphasis on the "ends" (*i.e.*, the *outcome* of the trial), and not the "means" (*i.e.*, the *process* that led to the conviction), may prove to be a most unfortunate precedent.¹²³

innocence." Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142-60 (1970).

122. 466 U.S. at 697.

123. State courts may not be bound by *Strickland's* holding if the state constitution has its own provisions requiring effective assistance:

[T]he decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977). In fact, many states interpret their state constitutions in ways that afford greater protection to a defendant's rights in criminal cases than those provided by the Federal Constitution. *See, e.g.*, *Ker v. California*, 374 U.S. 23, 34 (1977). Between 1970 and 1985, there have been more than 250 cases in which state appellate courts have considered the scope of rights guaranteed by the state constitution to be broader than the rights secured by the Supreme Court's interpretation of the Federal Constitution. COLLINS, *RELIANCE ON STATE CONSTITUTIONS: SOME RANDOM THOUGHTS, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW* 2 (B. McGraw ed. 1985). Justice Brennan, in an address at the 1986 annual meeting of the American Bar Association, declared that:

[M]y own view is that this rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions—spawned in part certainly by dissatisfaction with the decisional law being announced these days by the United States Supreme Court—is probably the most important development in constitutional jurisprudence of our times.

B. *United States v. Cronic*

The same day the Supreme Court decided *Strickland*, it decided *United States v. Cronic*.¹²⁴ The Tenth Circuit Court of Appeals had reversed the defendant's conviction in *Cronic*, finding that the defendant did not receive the effective assistance of counsel because of a combination of circumstances: the lack of sufficient time for investigation and preparation (the lawyer was given only twenty-five days by the court to prepare a case that took the government four-and-a-half years to investigate);¹²⁵ counsel's lack of experience in criminal matters (the young lawyer had practiced real estate law and had never participated in a jury trial prior to being appointed by the court to represent Cronic);¹²⁶ the seriousness of the charge;¹²⁷ the complexity of available defenses (Cronic had been indicted for thirteen counts of mail fraud involving more than \$9,400,000 in checks, and thousands of documents);¹²⁸ and the inaccessibility of witnesses. The Supreme Court held that for a reversal of the

Justice William J. Brennan Jr., The Fourteenth Amendment, Address to the Section on Individual Rights and Responsibilities of the American Bar Association 21-22 (August 8, 1986).

For an example of an attempt to have a state supreme court maintain, in light of *Strickland*, its more lenient standard for reversing on ineffective assistance counsel grounds, see Brief of Amicus Curiae, State Appellate Defender Office, *People v. Jemison*, 425 Mich. 880, 389 N.W.2d 866 (1986) (advocating continued utilization of the state standard which presumed prejudice when counsel failed to perform at least as well as a lawyer with ordinary training and skill). The concurring opinion of the Presiding Judge of the Supreme Court of Pennsylvania in *Commonwealth v. Garvin*, 335 Pa. Super. 560, 567-68, 485 A.2d 36, 40 (1984), noted that the *Strickland* decision is of no force while interpreting the corresponding provision of the Pennsylvania constitution, and recommended that "the rule in Pennsylvania court should be that if the defendant shows that counsel did not conduct the case in a reasonably competent manner, relief must be granted, unless the prosecution shows beyond a reasonable doubt that counsel's conduct had no effect on the outcome of the case."

124. 466 U.S. 648 (1984).

125. Courts frequently consider the amount of time it takes the prosecution to get a case ready for presentation to a Grand Jury and to obtain an indictment, as an indication of the complexity of the case and the amount of time required to prepare an adequate defense. See, e.g., *United States v. Golub*, 694 F.2d 207, 215 (10th Cir. 1982); *Townsend v. Bormar*, 351 F.2d 499 (6th Cir. 1965).

126. Inexperienced counsel may well require more time to prepare a criminal case and present it at trial than an attorney who has prepared similar cases. See *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970); *Stamps v. United States*, 387 F.2d 993, 995 (8th Cir. 1967); *Harris v. Housewright*, 697 F.2d 202 (8th Cir. 1982); *United States ex rel. Williams v. Twomey*, 510 F.2d 634 (7th Cir.), cert. denied, 423 U.S. 875 (1975).

127. Circuit Courts of Appeals repeatedly consider the seriousness of the charge as a critical factor in determining whether there has been adequate preparation time. See, e.g., *Wolfs v. Britton*, 509 F.2d 304 (8th Cir. 1975); *Rastrom v. Robbins*, 440 F.2d 1251 (1st Cir. 1971), cert. denied, 404 U.S. 863 (1971); *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970); *Townsend v. Bormar*, 351 F.2d 499 (6th Cir. 1965).

128. The factual and legal complexity of the case may be equal to the seriousness of the charge in determining the amount of time necessary to prepare an adequate defense. *United States ex rel. Spencer v. Warden, Pontiac Corr. Center.*, 545 F.2d 21, 23 (7th Cir. 1976).

conviction, the defendant must show specific errors committed by counsel. The mere presence of factors making it unlikely that there had been effective assistance would not suffice.¹²⁹ Taken in combination with *Strickland*'s prejudice requirement, state interference with counsel's ability to prepare an effective defense is generally not to be deemed sufficient to prove inadequate representation. A defendant must show that identifiable, specific errors committed by counsel substantially prejudiced the trial's result.¹³⁰

C. *Morris v. Slappy*

*Morris v. Slappy*¹³¹ also diminishes the likelihood of a reversal based on inadequate representation of counsel. The Supreme Court reversed the Ninth Circuit Court of Appeals' decision wherein the Ninth Circuit had declared that the sixth amendment right to counsel would "be without substance if it did not include the right to a meaningful attorney-client relationship."¹³² In *Morris*, the initial public defender representing the defendant had entered the hospital and the defendant asked for a continuance to avoid proceeding with a substitute attorney who had been appointed only six days before the trial was to begin. The defendant claimed that the new counsel had insufficient time to prepare and investigate, but the trial court denied the continuance request and ordered the trial to begin after being informed by the new attorney that he was ready to proceed. The defendant, however, maintained throughout the three-day trial that he had no attorney representing him since his attorney was in the hospital.¹³³

The Supreme Court upheld the trial court's refusal to grant the continuance, finding, first, that there was no merit to the claim that there was insufficient time for substituted counsel to prepare and, second, that

129. The Tenth Circuit had specifically held that the defendant was not required to show any specific errors committed by counsel when there were present clear "circumstances [which] hamper a given lawyer's preparation of a defendant's case." *United States v. Cronin*, 675 F.2d 1126, 1128 (10th Cir. 1982).

130. The Court in *Cronin* noted, however, that there continue to be circumstances of state interference that are so likely to prejudice the accused that it is unnecessary to litigate their specific effect in a particular case—for example, when there has been complete denial of counsel, denial of representation during an initial stage of the case, or when there has been a denial of the right to effective cross examination. 466 U.S. at 658.

131. 461 U.S. 1 (1983).

132. *Slappy v. Morris*, 649 F.2d 718, 720 (9th Cir. 1981), *rev'd*, 461 U.S. 1 (1983).

133. On the third day of the trial, the defendant presented the court with a *pro se* petition for a writ of habeas corpus, claiming he was unrepresented by counsel. After the judge denied the petition, the defendant told the court: "I don't have no attorney. My attorney's name is Mr. P.D. Goldfine, Harvey Goldfine, that's my attorney, he's in the hospital." *Morris v. Slappy*, 461 U.S. at 9.

an indigent defendant does not have an unqualified right to the counsel of his choice.¹³⁴ Chief Justice Burger's opinion specifically held that there is not a sixth amendment right to a "meaningful" attorney-client relationship, reasoning that "no court could possibly guarantee that a defendant will develop the kind of rapport with his attorney . . . that the Court of Appeals thought part of the sixth amendment guarantee of counsel."¹³⁵

The Court then proceeded to indicate its general distaste for the remedy of a retrial which results from a reversal of a conviction on ineffective assistance grounds:

In its haste to create a novel sixth amendment right, the court [the Ninth Circuit] wholly failed to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case. . . . [I]n the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.¹³⁶

The Court certainly seems to be implying that at times violations of a defendant's constitutional rights may be overlooked so as not to inconvenience witnesses or take up court time with a retrial.¹³⁷ This implication, coupled with *Strickland*'s "strong presumption" of competent representation,¹³⁸ may well send a message to the lower courts that there is no mandate for vigilant protection and enforcement of the right to effective assistance.

In *Morris*, the Supreme Court countenanced the trial judge's refusal to grant the continuance requested by the indigent defendant so as not to be forced to proceed to trial with an attorney he considered to be unprepared, even though many courts have held that when a defendant privately retains counsel, a court-ordered substitution of counsel deprives

134. *Id.* at 11-14. The issue presented here, however, is more properly stated as whether the trial court should have granted the defendant's request for continuous representation by the attorney who was initially *assigned* to represent him..

135. *Id.* at 13.

136. *Id.* at 14-15.

137. In a concurring opinion, Justices Blackmun and Stevens note that they find "the Court's rather broad-ranging dicta about the right to counsel and the concerns of victims (deserving of sympathy as they may be) to be unnecessary in this case." *Id.* at 29 (Blackmun, J., concurring).

138. *See supra* note 101.

the defendant of his sixth amendment right.¹³⁹ The American Bar Association Standards Relating to the Administration of Criminal Justice state clearly that "[c]ounsel initially provided should continue to represent the defendant throughout the trial court proceedings."¹⁴⁰

The Supreme Court itself, just eight years earlier, had viewed the attorney-client relationship quite differently than in its holding in *Morris*:

The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. . . . *An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction.*¹⁴¹

The Court's condoning of the substitution of an indigent's public defender days before the trial on five felony charges, and ignoring the defendant's claim that there is "just no way, no possible way, that he [the substituted lawyer] has had enough time to prepare this case,"¹⁴² indicates that the current Supreme Court will not be a sympathetic supporter of the indigent defendant's need to obtain a strong, effective, and productive relationship with his attorney.¹⁴³

139. See, e.g., *Releford v. United States*, 288 F.2d 298 (9th Cir. 1961), where the Court of Appeals held, in a setting similar to *Morris v. Slappy*, that the defendant had been denied effective assistance where the trial court refused to grant a continuance and ordered a substitute to represent the defendant, when the defendant's counsel was hospitalized; see also *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972); *Lee v. United States*, 235 F.2d 219 (D.C. Cir. 1956).

140. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 46, Standard 5-5.2. See also NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION RECOMMENDATIONS (1976). Recommendation .12 states in part: "Whenever an attorney-client relationship has been established between an eligible accused and his attorney, the defense system should not terminate or interfere with that relationship without great justification, and the attorney should resist efforts by the court to terminate or interfere with that relationship."

141. *Faretta v. California*, 422 U.S. 806, 820 (1975) (emphasis added).

142. *Morris v. Slappy*, 461 U.S. at 6.

143. The Commentary to ABA Criminal Justice Standard 5-5.3 states that, "To hold that counsel can be removed from the case of an impecunious defendant regardless of objection from the client and attorney is to subject such an accused to unjustified discrimination based solely on poverty." See also *Smith v. Superior Court of Los Angeles County*, 68 Cal. 2d 547, 562, 440 P.2d 65, 74, 68 Cal. Rptr. 1, 10 (1968) (to dismiss a court-appointed counsel over the defendant's objections and under circumstances in which a retained counsel could not be removed, would constitute an "unwarranted and invidious discrimination arising merely from the poverty of the accused").

V. Professional Standards of Competency for the Criminal Defense Attorney

In light of the difficulties for a defendant who was represented by an ineffective counsel in obtaining appellate relief, it is crucial that substantial efforts be made to insure that counsel act effectively and competently at the trial level. If reviewing courts are going to presume competency,¹⁴⁴ then the profession must clearly indicate to counsel what indeed must be done to provide competent representation. There have been attempts to provide some guidelines for competent representation, but they are too general to be of much practical assistance.

A. Standards Relating to the Administration of Criminal Justice

In 1972, prominent defense lawyers, law professors, judges, and prosecutors developed guidelines to encourage representation which meets constitutional requirements and provides an effective criminal process.¹⁴⁵ These guidelines, known as the American Bar Association Standards Relating to the Administration of Criminal Justice (hereinafter Criminal Justice Standards) have been described by former Chief Justice Burger as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history."¹⁴⁶ The Criminal Justice Standards were designed to provide procedural guidelines for the practice of criminal law,¹⁴⁷ and constituted "the optimum achievable consensus on what the relevant law should be."¹⁴⁸

Chapter Four of the Criminal Justice Standards, "The Defense Function," describes the proper role of the criminal defense lawyer. The standards set forth, however, are general and lofty in nature and do not specify sufficiently the exact work necessary to properly prepare a case. For example, Chapter Four sets out such standards as: "The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to

144. See *supra* note 101.

145. Proceedings at the National Judicial Conference on Standards for the Administration of Criminal Justice (Feb. 10-14, 1972) (Baton Rouge), reprinted in 57 F.R.D. 229, 240-41 (1973).

146. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251 (1974). The Criminal Justice Standards currently in effect are the Second Edition, 1980, with a 1986 Supplement.

147. Jameson, *The Beginning: Background and Development of the ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 255 (1974).

148. Day, *Appellate Court Use of the American Bar Association Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 415, 420 (1975).

the utmost of his or her learning and ability and according to law.”¹⁴⁹

The Commentaries to the Criminal Justice Standards are hardly more useful. The Commentary to the above Standard, for example, states in part: “Once a case has been undertaken, a lawyer is obliged not to omit any essential honorable step in the defense. . . .”¹⁵⁰ What steps are “essential”? And what guidance is given counsel by telling him he should not omit an *honorable* step? The Criminal Justice Standards are, however, helpful in inspiring the advocate to devote energy, zeal, diligence, and care to the representation of his client,¹⁵¹ and have been cited by courts in assessing the responsibilities of counsel that are required by the Sixth Amendment.¹⁵² They have also been cited to support a contempt of court judgment against a lawyer.¹⁵³

B. The Model Code of Professional Responsibility

“Whereas the Criminal Justice standards are not model codes or rules . . . [but] are guidelines and recommendations intended to help criminal justice planners”,¹⁵⁴ the American Bar Association Model Code of Professional Responsibility (hereinafter the Code) does provide rules for lawyers which serve both as an aspirational guide in the form of Ethical Considerations, and as a basis for disciplinary action when a lawyer’s conduct violates the minimum standards stated in the Disciplinary

149. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 46, Standard 4-1.1(b).

150. *Id.* Standard 4-1.1 (commentary at p. 4.8).

151. Chapter Five of the Standards is entitled, “Providing Defense Services.” Standard 5-1.1 states that “[t]he objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter.” In the History of the Standard, it is stated that quality representation “contemplates providing to the accused the same standard of legal services that a defendant of financial means can purchase.” *Id.* at p. 5.7.

152. See *Jones v. Barnes*, 463 U.S. 745, 753 n.5 (1983); *Cuyler v. Sullivan*, 446 U.S. 335, 346 n.11, (1980); *Holloway v. Arkansas*, 435 U.S. 475, 486 n.8 (1978); *McQueen v. Swenson*, 498 F.2d 207, 216-17 (8th Cir. 1974) (citing Standard 4.1, regarding the duty to investigate); *United States ex rel. Robinson v. Housewright*, 25 F.2d 988, 993 (7th Cir. 1975) (citing Standard 3.5 (b), regarding conflict of interest); *United States ex rel. Sabella v. Folette*, 432 F.2d 572, 576 n.2 (2d Cir. 1970) (citing Standard 5.2 (b) (Tentative Draft (1970)), regarding the control and direction of the case); *State v. Perez*, 99 Idaho 181, 183, 579 P.2d 127, 130 (1978) (citing Standard 4.1); *Weatherall v. State*, 73 Wis. 2d 22, 31 n.16, 242 N.W.2d 220, 225 n.16 (1976) (citing Standard 4.0); *State v. Thomas*, 232 N.W.2d 766, 768 (Minn. 1975); *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). *Strickland v. Washington*, 466 U.S. at 688, also mentions the Criminal Justice Standards stating that they are guides (“but they are only guides”), to assist a reviewing court in determining whether counsel’s performance was reasonable and conformed to norms of practice.

153. See, e.g., *Hawk v. Superior Court*, 42 Cal. App. 3d 108, 116 Cal. Rptr. 713, 719, 725 (1974), *cert. denied*, 421 U.S. 1012 (1975).

154. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 46, at p. XX.

Rules.¹⁵⁵ Canon Six of the Code (A Lawyer Should Represent A Client Competently) is directly applicable to the defense attorney. The most relevant Disciplinary Rule of Canon Six is DR 6-101:

Failing to Act Competently

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.¹⁵⁶

Although there was no provision regarding competence in the prior ABA Canons of Professional Conduct,¹⁵⁷ courts have long held that lawyers have a responsibility to act competently.¹⁵⁸

The Code provides little specific guidance for the defense attorney.¹⁵⁹ The Code, for example, does not specifically define competence beyond that given in the Disciplinary Rule above. As the Conference Director of the 1981 Conference, "Enhancing the Competence of Lawyers",¹⁶⁰ stated: "It is characteristic of lawyers dealing with the competence issue to decide . . . that it is impossible to define competence."¹⁶¹

155. The Preliminary Statement to the Code refers to the Ethical Considerations as "aspirational" in character, representing the objectives toward which each attorney shall strive, and the Disciplinary Rules as "mandatory" in character. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 44.

156. *Id.* Most of the Formal and Informal Opinions of the ABA Committee on Professional Ethics, interpreting the Code, which concern issues of a lawyer's competence, center on neglect. See ABA Comm. on Professional Ethics, Informal Op. 1442 (1979). Informal Opinion 1273 (1973) explains neglect:

Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to a client. . . . Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error in judgment made in good faith.

157. The ABA Code of Professional Responsibility correlates DR 6-101 (A)(3) only to Canon 21 concerning the duty to be punctual, concise, and direct in the disposition of cases.

158. See, e.g., *Kissam v. Bremerman*, 44 N.Y. App. Div. 588, 61 N.Y.S. 75 (1899); *Malone v. Gerth*, 100 Wis. 166, 75 N.W. 972 (1898).

159. For a proposal of a Disciplinary Rule that would reflect the sixth amendment requirement for effective assistance, see Steinberg, *The Disciplinary Rules and Competence of Counsel: A Proposed Alternative*, 11 GONZ. L. REV. 133 (1975).

160. ALI-ABA COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, REPORT OF THE HOUSTON CONFERENCE, ENHANCING THE COMPETENCE OF LAWYERS XI (1981).

161. *Id.* at X. Little was added by that Conference's attempt to proceed to clarify competence: "Generally speaking, however, we refer to competence as a personality trait or characteristic or set of habits we wish to inculcate in the lawyer, while good performance is the typical (but not invariable) action or expression of this trait." The Report of the Houston Conference, Enhancing the Competence of Lawyers, David Brinks Address to the Conference xi (1981). But lack of specificity has not prevented widespread use of the term; the President of

C. The Model Rules of Professional Conduct

The American Bar Association Model Rules of Professional Conduct (hereinafter Model Rules) include another attempt to provide guidelines for competent representation. The House of Delegates of the ABA adopted the Model Rules in August, 1983, after years of study and draft-recommendations by the ABA Commission on Evaluation of Professional Standards. The ABA had intended that the states would adopt the Model Rules to replace the Code, but, as of early 1986, only eleven states have done so.¹⁶² As a reflection of the increased concern for lawyer competency, the Model Rules have attempted at the outset to particularize the elements of competence:

RULE 1.1 Competence:

A Lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.¹⁶³

A different section of the Model Rules deals with diligence.¹⁶⁴ As was true with the Code, however, there are no specific standards describing what a criminal defense attorney ought to do in preparing a client's defense in order to insure the effective assistance of counsel.¹⁶⁵

D. The American Lawyer's Code of Conduct

Finally, the American Lawyer's Code of Conduct (Code of Conduct), prepared under the auspices of the Roscoe Pound-American Trial Lawyers Foundation as an alternative to the Code and the Model Rules, also attempted to provide guidelines to insure competent representa-

the American Bar Association in 1981-82 has said that "if as we look ahead, there is a single word that can be used to characterize the likely *dominant issue of the 1980's*, that word may be competence." *Id.* at 320 (emphasis added).

162. *Quo vadis Model Rules?*, 72 A.B.A. J. 8 (Apr. 1986). The states that have adopted the Model Rules are Arizona, Arkansas, Delaware, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, and Washington. 1 ABA-BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 334, 445, 855, 924, 961, 1026, 1127 (1984-85); 2 ABA-BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 14 (1986). The unenthusiastic response to the Model Rules is a sharp contrast to the rapid adoption by the states of the Code: forty states had adopted the Code within two years of the ABA adoption. *Debating the Model Rules—Critical Points of Contention*, N.Y. L.J., Sept. 24, 1985, at 2, col. 1.

163. MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 45, Rule 1.1.

164. *Id.* at Rule 1.3: "A lawyer shall act with reasonable diligence and promptness in representing a client."

165. Particularized standards would provide a useful indicator of what the legal profession expects of members of the bar, and lawyers who violate the specified requirements of competent representation could be made subject to discipline. *See infra* text accompanying notes 177-180.

tion.¹⁶⁶ Although the Code of Conduct principally concerns the duties of a trial lawyer, it falls far short of what is required for effective assistance of counsel. The Preamble emphasizes the notion that concern for the client is paramount:

Before any person is significantly affected by society in his or her person, relationships, or property, our system requires that certain processes be duly followed—processes to which competent, independent and zealous lawyers are essential. And if it be observed that the stated ideal is too frequently denied in fact, our response must be that standards for lawyers be so drafted and enforced as to strive to make that ideal a reality.¹⁶⁷

The Code of Conduct has not been adopted by any state, and its influence on the profession has been insignificant.¹⁶⁸

E. The Need for Particularized Standards

The majority in *Strickland v. Washington* opposed the creation of detailed guidelines for effective representation, claiming that “the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause.”¹⁶⁹ Justice Marshall’s dissent, however, criticized the majority’s use of general rather than particularized standards:

To tell lawyers and the lower courts that counsel for a criminal defendant must behave “reasonably” and must act like “a reasonably competent attorney,” . . . is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes “professional” representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel.¹⁷⁰

166. AMERICAN LAWYER’S CODE OF CONDUCT (Revised Draft 1982).

167. *Id.* Preamble.

168. The antagonism of the sponsors of the Code of Conduct to the A.B.A. is perhaps most clearly illustrated by the following portion of the Introduction to the Code of Conduct:

The A.B.A. first added the adjective “Model” to the title of its Code to avoid federal charges that its promulgation of the Code was restraint of trade. The A.B.A. Commission [on Professional Responsibility] now seems to make a virtue of necessity, it always refers to its workproduct as the *Model* rules, although it courts federal displeasure by always calling the CPR “the Code,” never the “Model Code.” Refusing to take any A.B.A. product for a model, we consistently refer to existing law as “the Code of Professional Responsibility” and to what the A.B.A. Commission has recommended as “the proposed Rules of Professional Conduct.”

Id. at n.1.

169. 466 U.S. at 689.

170. *Id.* at 707-08 (Marshall, J., dissenting). Justice Brennan, concurring in part and dissenting in part, did not consider the setting of particularized standards flexible enough to accommodate the wide variety of situations that lead to claims of ineffective assistance. *Id.* at 703-04 (Brennan, J., concurring and dissenting). Although Justice Blackmun joined in the

Particularized standards which guide lawyers through every stage of the criminal proceeding, might actually diminish the number of inadequate representation claims. Such standards detailing the steps that ought to be taken in preparing a case would assist and guide the attorney in the preparation of the defense in a criminal trial,¹⁷¹ and would be especially useful to the novice attorney or the lawyer whose specialty is in another area of law, but who recently has taken on a criminal case.¹⁷²

Particularized requirements would also enable defendants to understand what is involved in the defense of a case and might well enable them to more actively participate in the process that so vitally affects them. Through such standards, the trial judge would be able to monitor more effectively the quality of representation the defendant was receiving. Moreover, the lack of specific standards makes it more difficult to evaluate the competency of the representation provided. This in turn diminishes the likelihood of obtaining appellate relief for a defendant who had ineffective counsel at trial.¹⁷³

The profession's failure to adopt particularized standards may be motivated, in part, by a concern that greater specification may increase the vulnerability of attorneys to malpractice actions.

majority decision in *Strickland*, his dissent in *Polk County v. Dodson*, 454 U.S. 312, 335 n.5 (1981), noted that the "state is responsible for the public defender's office and can attempt to ensure that clients receive effective assistance of counsel, for example, by hiring qualified personnel, providing sufficient funding, and *enforcing strict standards of competence*." (Blackmun, J., dissenting) (emphasis added).

171. The Author is a member of the National Legal Aid and Defender Association (NLADA) Defense Counsel Competency Committee which has prepared proposed Performance Guidelines for Criminal Defense Representation. The NLADA in the fall of 1986 will consider the Guidelines for adoption. The Performance Guidelines enumerate specific actions that counsel should take at various stages of the proceedings in order to effectively represent his client. The Guidelines are presently organized as follows: 1. General Principles of Representation; 2. Pretrial Release; 3. Preliminary Proceedings; 4. General Case Preparation; 5. Pretrial Motions; 6. Disposition by Plea; 7. Trial Proceedings; 8. Sentencing; 9. Post-judgment Proceedings.

172. Former Chief Justice Burger, in his Sonnett lecture at Fordham University Law School, indicated that new lawyers are greatly in need of assistance and guidance, especially in criminal cases. Reprinted in Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 231 (1973). See also Sirica, *The Art of Legal Advocacy: Duties and Obligations*, in *LAWYER'S ETHICS* 59, 61 (Gerson ed. 1980).

173. Some courts have attempted to develop their own standards to assist in evaluating claims of ineffective assistance. See, e.g., *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968) (specifying distinct duties owed to client); *Braxton v. Peyton*, 365 F.2d 563, 564 (4th Cir.), cert. denied, 385 U.S. 939 (1966); see also *People v. Pope*, 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979) ("farce and mockery" standard eliminated; basic duties enumerated).

VI. Underfunding of Defender Offices and the Resulting Inadequate Representation by Counsel

Much of the criticism leveled at trial attorneys for inadequate representation of their client's interests has focused on those attorneys representing indigents in criminal cases. The former Chief Judge of the D.C. Circuit Court of Appeals has described the appalling lack of effective assistance that he has noted in reviewing claims of inadequate representation:

[T]he battle for equal justice is being lost in the trenches of the criminal courts where the promise of *Gideon* and *Argersinger* goes unfulfilled. The casualties of those defeats are easy to identify. . . . The prime casualties are defendants accused of street crimes, virtually all of whom are poor, uneducated, and unemployed. They are the persons being represented all too often by "walking violations of the sixth amendment."¹⁷⁴

A. Types of Systems Used for the Delivery of Defense Services to Indigents

Institutions providing defense representation for indigents began as volunteer agencies, because traditionally there had been no compensation for counsel appointed by the court in either the federal or state systems.¹⁷⁵ After the *Gideon* decision in 1963,¹⁷⁶ however, Congress passed the Criminal Justice Act¹⁷⁷ authorizing remuneration for the representation of indigents by attorneys from a legal aid agency or from the private bar.¹⁷⁸

Today, states and counties use four types of systems to provide counsel for indigent defendants: (1) the public defender system, in which the attorneys are public employees and the office is supported by public

174. Bazelon, *Realities*, *supra* note 116, at 811-12 (quoting from Bazelon, *Defective Assistance*, *supra* note 52, at 2).

175. See SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY (American Bar Foundation 1965); REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963).

176. See *supra* note 7.

177. 18 U.S.C. § 3006A (1982).

178. There were no federal funds forthcoming after the *Gideon* and *Argersinger* mandates for representation in state court; the Criminal Justice Act provided funds only for federal court representation. At the time of the *Argersinger* decision, 65% of all felony defendants and 47% of those charged with misdemeanors were unable to afford legal representation. NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT ON THE COURTS 79 (1973) [hereinafter cited as NATIONAL ADVISORY COMM'N REPORT].

funds;¹⁷⁹ (2) the private defender system, in which a non-profit agency receives private charitable donations and public funds, and contracts with the county or state to provide representation;¹⁸⁰ (3) the assigned counsel system in which individual private attorneys are appointed to represent indigent defendants as the need arises;¹⁸¹ and (4) the contract system, in which a single attorney or a group of attorneys contracts with a funding source to represent a fixed or maximum number of cases for a set fee.

B. Studies Revealing the Lack of Effective Assistance to the Poor

Nationwide studies evaluating the delivery of defense services to indigents have consistently cited the inadequate representation provided the poor. In 1973, for example, the National Legal Aid and Defender Association (NLADA) conducted a sixteen month study, financed by the Law Enforcement Assistance Administration, to assess delivery of defense services in 3,000 counties across the country.¹⁸² One of the authors of the final report summed up the findings:

The scope of representation provided for indigent defendants in many jurisdictions does not meet specific constitutional directives of the Supreme Court Moreover, the resources allocated to indigent defense services are grossly deficient in light of the needs of adequate and effective representation. Relatively few indigent defendants have the benefit of investigation and other expert assistance in their defense. Their advocates are overburdened, under-trained, and underpaid.¹⁸³

179. In 1961, two years prior to *Gideon*, only 2.9% of the nation's counties had defender systems. E. BROWNELL, *LEGAL AID IN THE UNITED STATES* 13 (1961). As of 1982, fifteen states had a state administered program in which a chief State Public Defender is appointed to develop and maintain a system of representation for each county in the state. In thirty-two states there are county systems where the chief public defender for the locality is selected by the local board of supervisors, county council, or other governing board. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, CRIMINAL DEFENSE SYSTEMS 2-3 (1984).

180. The Legal Aid Society of New York City is perhaps the best known of this type of system.

181. Some commentators have characterized systems which divide the caseload between the public defender and the private bar as "mixed" or "hybrid" systems. See NATIONAL CENTER FOR STATE COURTS PUBLICATION R 0009, IMPLEMENTATION OF ARGERSINGER V. HAMLIN, A PRESCRIPTIVE PROGRAM PACKAGE 46 (1974); see generally, SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, EQUAL JUSTICE FOR THE ACCUSED 45-70 (1959).

182. The study is published as L. BENNER & B. NEARY, *THE OTHER FACE OF JUSTICE* (1973) [hereinafter cited as BENNER & NEARY].

183. Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667, 684-85 (1975).

That same year, the National Advisory Commission on Criminal Justice Standards and Goals issued its Task Force Report on the Courts and concluded that "the lack of Financial and manpower resources has severely crippled the attempts of indigent defense systems to provide truly effective representation."¹⁸⁴ In 1975, the Director of the National Association of Criminal Defense Lawyers concluded:

The grim and unacceptable reality that must be faced after an objective review of the present status of indigent representation in the United States is that there has been little awareness in many cities, counties, and states of the obligation to the indigent, and even less affirmative action to incur the financial cost to rectify the failure of the obligation.¹⁸⁵

The American Bar Association Standing Committee on Legal Aid and Indigent Defendants, in cooperation with the Criminal Justice Section, the General Practice Section of the ABA, and the NLADA, held a hearing in 1982 to examine funding of indigent defense services. The publication resulting from the hearing¹⁸⁶ concluded that public defenders had too many cases, the financing of criminal defense services for indigents was generally inadequate, and inadequate compensation pressured appointed counsel to plead their cases out as quickly as possible.¹⁸⁷ The Report also concluded that in some areas of the country indigent defendants were not provided competent counsel and that indigent defendants faced injustices simply because of their poverty. The report asserted that "[w]e must be willing to put our money where our mouth is; we must be willing to make the constitutional mandate a reality."¹⁸⁸

Severe deficiencies in the funding of defense services for indigents in public defender offices have been found in various studies nationwide.¹⁸⁹

184. BENNER & NEARY, *supra* note 182, at 77.

185. Friloux, *Equal Justice Under the Law: A Myth, Not a Reality*, 12 AM. CRIM. L. REV. 691, 707 (1975).

186. THE AMERICAN BAR ASSOCIATION, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, GIDEON UNDONE! THE CRISIS IN INDIGENT DEFENSE FUNDING (1982) [hereinafter cited as GIDEON UNDONE]. In explaining the Report's choice of title, it was stated that "[i]t is clear that unless positive steps are taken to address these problems, the promise of Gideon v. Wainwright will indeed be undone." *Id.* at 1.

187. *Id.*

188. *Id.* at 3.

189. See, e.g., BOSTON BAR ASSOCIATION, ACTION PLAN FOR LEGAL SERVICES PART TWO: REPORT ON CRIMINAL DEFENSE SERVICES TO THE POOR IN MASSACHUSETTS (1978), summarized in LEFSTEIN, *supra* note 76, at Appendix F-27 ("insufficient funding is the major problem in providing effective representation for indigent defendants"); AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, SITE EVALUATION TEAM REPORT ON SAN FRANCISCO COUNTY (1980), reported in LEFSTEIN, *supra* note 76, at 33 (the San Francisco Public Defender's Office was "woefully underfunded and, as a consequence, suffered a wide variety of money-related problems"); OHIO PUBLIC

In 1979, the ABA Standing Committee on Legal Aid and Indigent Defendants initiated a study to examine state and local government expenditures for representation of the indigent defendant. Three years later the study produced the most significant, detailed, and comprehensive study of its kind. The Introduction to the Report summarizes the unfortunate situation:

Overall, there is abundant evidence in this report that defense services for the poor are inadequately funded. As a result millions of persons in the United States who have a constitutional right to counsel are denied effective legal representation. Sometimes defendants are inadequately represented; other times, particularly in misdemeanor cases, no lawyer is provided or a constitutionally defective waiver of counsel is accepted by the court. Defendants suffer quite directly, and the criminal justice system functions inefficiently, unaided by well trained and dedicated defense lawyers. There are also intangible costs, as our nation's goal of equal treatment for the accused, whether wealthy or poor, remains unattained.¹⁹⁰

Evaluations of defense systems throughout the country have found localities violating the *Argersinger* mandate that no one can lose his liberty if he did not have counsel representing him.¹⁹¹ For example, the National Center for Defense Management assessed indigent representation in Nueces County, Texas, in 1978 and concluded that "generally the

DEFENDER COMMISSION, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, REPORT ON THE REPRESENTATION AFFORDED INDIGENT PERSONS IN FELONY CASES, ERIE COUNTY, OHIO 6 (1982) (the Defender Office's budget was cut 15% in 1980-81 even though the number of arrests had increased 71%); OHIO PUBLIC DEFENDER COMMISSION, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, EVALUATION OF THE LEGAL REPRESENTATION AFFORDED INDIGENT PERSONS IN CRIMINAL AND ORDINANCE CASES IN THE COURT OF MONTGOMERY COUNTY, OHIO, FINAL REPORT 28 (1982) (underfinancing led to serious understaffing which affected the quality of representation).

190. LEFSTEIN, *supra* note 76, at 2.

191. See, e.g., NATIONAL DEFENDER INSTITUTE, EVALUATION OF FOUR COUNTY PUBLIC DEFENDER PROJECTS FOR THE EIGHT B JUDICIAL DISTRICT, IOWA (1979), reported in LEFSTEIN, *supra* note 76, at Appendix F-18; NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, ALABAMA STUDY: SURVEY OF LEGAL SERVICES PROVIDED INDIGENT CRIMINAL DEFENDANTS (1980), reported in LEFSTEIN, *supra* note 76, at Appendix F-2; NATIONAL CENTER FOR DEFENSE MANAGEMENT, MICHIGAN STATEWIDE STUDY—PHASE I SURVEY (1978), reported in LEFSTEIN, *supra* note 76, at Appendix F-29; NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, TENNESSEE COURT STUDY: DEFENSE SYSTEM STUDY (1977), reported in LEFSTEIN, *supra* note 76, at Appendix F-52 (although Tennessee had a law requiring appointment of counsel in all misdemeanor cases, even when no jail time could be given as a sentence, assignments simply were not made in misdemeanor cases and indigents were forced to proceed without representation).

county is in flagrant violation of *Argersinger v. Hamlin*.¹⁹² A study conducted by Boston University's Center for Criminal Justice in 1976 assessed the implementation of *Argersinger* and concluded that the response to *Argersinger* has simply been to assign additional cases to already overwhelmed public defenders, with the result being "that the sixth amendment right to counsel is an empty one for many defendants."¹⁹³

Public defender offices are always subject to budget reductions, and when the county or state becomes particularly hard-pressed, the level of funding, already at a minimum level, can fall drastically. In New Mexico, the statewide Public Defender program had a twelve percent increase in felony caseloads in both fiscal year 1981 and 1982, but when the state needed funds to meet financial obligations, the Public Defender Office was asked to return \$80,000 of its already appropriated budget for fiscal year 1983.¹⁹⁴ After Proposition 13 was passed in California in 1977,¹⁹⁵ the amount of state funds available to county budgets was limited, and an informal survey taken in the aftermath of Proposition 13 revealed that defender offices in San Francisco County had a thirty-five percent increase in caseload per attorney and Los Angeles County had a twenty-eight percent increase.¹⁹⁶ The Public Defender office in Alameda County, in the three years following the adoption of Proposition 13, lost sixteen percent of its staff while its caseload increased thirty-eight percent.¹⁹⁷ Seattle and Philadelphia's Public Defender offices experienced similar budget cuts.¹⁹⁸

192. NATIONAL CENTER FOR DEFENSE MANAGEMENT, ASSESSMENT OF DEFENSE SERVICES: NUECES COUNTY, TEXAS (1978), reported in LEFSTEIN, *supra* note 76, at Appendix F-58.

193. S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD, & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN 5 (1976) [hereinafter cited as KRANTZ & SMITH].

194. Wilson, *Empty-handed Justice*, 22 THE JUDGE'S JOURNAL 20 (1983).

195. CAL. CONST. art. XIII A § 1 (West 1978) limited the annual tax permitted to be set on real property to 1% of the full value of the property.

196. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 488 n.66.

197. Portman, *Financing the Right to Counsel: A View from a Local Public Defender*, 19 LOY. L.A.L. REV. 363, 366-67 (1985).

198. In Seattle (King County), Washington, the Public Defender office received a budget allocation in 1982 which was 18% lower than the preceding year's spending level even though the office had in fact previously expressed complaints that its caseloads were too high. Wilson, *supra* note 194, at 21-22. It is not just local funds that can be cut. In Philadelphia in 1968, federal funds and a private grant that had been supporting a large part of the Defender's budget, were terminated. Comment, *Client Service in a Defender Organization: The Philadelphia Experience*, 117 U. PA. L. REV. 448, 448 n.2 (1969).

Moreover, in those states where the counties have the full responsibility for financing defense services, the greatest constitutional violations may occur due to underfunding.¹⁹⁹ Counties with a low tax base often have the greatest incidence of crime and a high percentage of defendants unable to afford a private attorney. Where the need, therefore, is the greatest, the county's ability to finance defense services for indigents may well be the least. Inadequate funding in these public defender offices results in a staff of attorneys whose number are insufficient to competently represent all of the office's clients. In a state-financed system, there can be more consistency in the delivery of defense services and statewide standards of competency and performance can be imposed.²⁰⁰

Defendants can be expected to be aware of the failings of the representation provided them. Interviews with defendants reveal their lack of confidence in court-appointed counsel.²⁰¹ The resulting bitterness can

199. See THE RECOMMENDATION OF THE REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SERVICES IN THE UNITED STATES § 2.1 (1976): "Defender services should be organized at the state level in order to ensure uniformity and equality of legal representation and supporting services, and to guarantee professional independence for individual defenders." See also NATIONAL ADVISORY COMM'N REPORT, *supra* note 178, at Standard 13.6. In 1985, more than half the states financed all or a majority of the costs of providing public defense services. Wasserman, *The Case for State Financing of Public Defense Services* 7, THE DEFENDER, No. 9, at 9 (Nov./Dec. 1985). Oregon was one of the most recent states to transfer responsibility from the county to the state level. OR. REV. STAT. § 135.055 (Supp. 1984). The state court administrator for the Oregon Judicial Department has written that the change "was a direct result of local funding problems. The constant variable in the process was the counties' desire to rid themselves of an unpopular and largely uncontrollable expense at a time when their financial resources were diminishing." Linden, *Financing the Right to Counsel: The Oregon Experience*, 19 LOY. L.A.L. REV. 399, 400 (1985). California is unique in its two-tiered structure: local financing for defenders at trial court level and state funding for representation in appellate court. See *Meeting the Challenge: A Panel Discussion of Political Leaders*, 19 LOY. L.A.L. REV. 417 (1985).

200. Since it is the state laws which govern the commission of serious crimes anywhere within the state, the state ought to be obligated to provide the funds required to insure adequate representation to those indigents charged with violating the laws of the state.

201. Interviews with defendants charged with felonies in Connecticut revealed that only 20.4% of those represented by public defenders responded affirmatively to the question, "do you think [your lawyer] was on your side?" whereas 100% of defendants with privately-retained counsel answered positively. CASPER, *AMERICAN CRIMINAL JUSTICE, THE DEFENDANT'S PERSPECTIVE* 105 (1972). See also Arcuri, *Lawyers, Judges and Plea Bargaining: Some New Data on Inmate Views*, in INT'L J. OF CRIMINOLOGY & PENOLOGY 177 (1976) (inmates with private lawyers were twice as likely as those with appointed counsel to believe they got a good defense). A study of prisoners in Texas concluded that "[t]he prisoners felt that private counsel is better prepared than his publicly supported counterpart." Alpert, *Inadequate Defense Counsel: An Empirical Analysis of Prisoners' Perceptions*, 7 AM. J. OF CRIM. L. 1, 17 (1979). Sixty-three percent of the prisoners answered "no", to the question "did your lawyer discuss defense strategies with you?" *Id.* at 11. An evaluation of Florida defendants' responses to their representation similarly revealed that only 41% of those defendants with pub-

only increase the anger and resentment felt by a convicted defendant toward "the system", after he is released from prison.²⁰²

The plight of an underfunded public defender office where the attorneys are overburdened with cases has been found to lead to inadequate representation in many forms: the attorneys may not have sufficient time to study police reports in advance of preliminary hearings so as to be able to maximize their cross examination of the prosecution witnesses;²⁰³ there are insufficient funds to hire expert witnesses and the applications that defenders must make to the court for funds for experts are frequently denied;²⁰⁴ there is insufficient time to plan strategy or subpoena witnesses;²⁰⁵ there is minimal use of pre-trial discovery;²⁰⁶ witnesses must be interviewed when they are caught in the courthouse corridors;²⁰⁷ there is little or no training program²⁰⁸ and new, inexperienced lawyers may be

lic defenders believed that the attorney used "all legal means possible to aid the client," as contrasted to 71% of those with privately retained attorneys. Berger & Handberg, *Symbolic Justice: Disappointed Client Views of Their Attorneys*, 2 CRIM. JUST. REV. 113, 114 (1977). See also, REPORT OF THE ADVISORY COMMISSION ON CIVIL DISORDERS 337 (Bantam ed. 1968) ("The belief is pervasive among ghetto residents that lower courts in our urban communities dispense 'assembly-line' justice; that from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent."). The situation seems to be the same concerning representation provided by public defenders in juvenile courts. See Platt, Schechter & Tiffany, *In Defense of Youth: A Case of the Public Defender in Juvenile Court*, 43 IND. L.J. 619, 633 (1968) ("The structural demands under which the public defender operates make it apparent to his clients that he is not 'their' advocate—dedicated to the best defense possible.") [hereinafter cited as Platt, *In Defense of Youth*].

202. For a discussion of inmate bitterness toward the lack of vigorous advocacy by counsel, see N.Y. Times, Aug. 11, 1970, § 1, at 6, col. 3, an article concerning the grievances of inmates that led to the 1970 jail disturbances in New York City. The disrespect that defendants have for their Legal Aid counsel is illustrated by an investigative reporter's description of inmate conversations: "'You got a lawyer?' is the question most often asked in the cells. 'No,' goes the answer. 'I got Legal Aid.'" Pileggi, *The Last Liberals: Legal Aid Under Siege*, New York Magazine 29, 35 (Sept. 13, 1982). See also Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE L. REV. OF L. & SOC. ACTION 4 (1971).

203. LEFSTEIN, *supra* note 76, at 35.

204. *Id.* at 37-38.

205. *Id.* at 43.

206. NATIONAL CENTER FOR DEFENSE MANAGEMENT, MANAGEMENT EVALUATION: DEFENDER CORPORATION OF GREENVILLE COUNTY, GREENVILLE, SOUTH CAROLINA (1978), reported in LEFSTEIN, *supra* note 76, at Appendix F-48.

207. Bazelon, *Realities*, *supra* note 116.

208. REPORT OF THE INVESTIGATIVE TEAM REPRESENTING THE ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS EVALUATING THE SAN FRANCISCO COUNTY PUBLIC DEFENDER OFFICE (1980), reported in LEFSTEIN, *supra* note 105, at 36 (caseload pressures and limited resources prohibit the "luxury" of a substantial training program).

forced into trial against a highly-experienced adversary,²⁰⁹ and defendants become depersonalized and are not treated as individualized clients.²¹⁰

The House of Delegates of the American Bar Association has called for improvement in the system for providing indigent defense services on six occasions from 1979 to 1983—"a virtually unprecedented demonstration of concern about one subject by our House" testified an ABA representative before a House Judiciary Subcommittee.²¹¹

VII. Specific Deficiencies in Representation Resulting from Excessive Caseload

A. Inadequate Case Preparation

The aspects of representation that suffer most when the defender is confronted with an excessive caseload are the preparation and investigation of the case,²¹² and effective communication between the attorney and his client. Thorough preparation of a case is perhaps the most important aspect of effective advocacy.²¹³ The most able attorney cannot

209. NATIONAL CENTER FOR DEFENSE MANAGEMENT, MANAGEMENT EVALUATION: DEFENDER CORPORATION OF GREENVILLE COUNTY, GREENVILLE, SOUTH CAROLINA (1978), reported in LEFSTEIN, *supra* note 76, at Appendix F-48.

210. S. BING & S. ROSENFELD, THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON 31 (1970).

211. Testimony of Lionel Barrett, on behalf of the American Bar Association, before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice 1 (July 14, 1983).

212. See, e.g., S. SINGER, B. LYNCH & R. SMITH, INDIGENT DEFENSE SYSTEMS ANALYSIS (1978), reprinted in LEFSTEIN, *supra* note 76, at Appendix F-1 (site visits and mail questionnaires to 399 defender agencies found that caseload pressures directly coincided with inadequate preparation time). The National Center for Defense Management in its evaluation of the Santa Clara County, California Public Defender Systems, concluded that because of the 502 cases that the average attorney represented in 1976, careful attorney preparation was impossible (reported in LEFSTEIN, *supra* note 76, at Appendix F-12); Bazelon, *Realities*, *supra* note 116, at 830 (lack of preparation is the most common failing of counsel); Maddi, *Trial Advocacy Competence: The Judicial Perspective*, 1978 AMER. BAR FOUND. RESEARCH J. 105, 144 (a majority of judges ranked preparation as the most important factor in determining a trial lawyer's competence).

213. The Third Circuit, in reversing the conviction upon finding inadequate representation by counsel, stated:

[A]dequate preparation for trial often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skill exhibited in the courtroom. The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge.

Moore v. United States, 432 F.2d 730, 735 (3d Cir. 1970). See also Levine, *Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 TOLEDO L. REV. 1275, 1371 (1984) (analysis of claims

render effective assistance in the defense of his client if his lack of preparation before, during, and after trial prevents the attorney from learning readily available information that would have resulted in a more favorable plea bargain, a justifiable defense at trial, or a more lenient sentence after conviction.²¹⁴ The most frequently successful appeal based upon ineffective assistance of counsel arises from the failure of counsel to adequately investigate the case and to call defense witnesses.²¹⁵

Attorneys who work in public defender offices commonly complain of an excessive caseload which prohibits their having adequate time to prepare their cases.²¹⁶ A study of 100 trial attorneys in Cook County (Chicago) examined attorney assessment of the competency of other trial lawyers. In reply to the question: "Among those [attorneys] doing a less than competent job, what are their major deficiencies?", the most common response cited by over half of the responding lawyers was lack of preparation.²¹⁷

filed in Michigan from 1969 to 1981 revealed that the most frequent type of allegation of ineffective assistance was the failure of counsel to investigate or introduce defense evidence); Brosnahan, *Basic Principles of Advocacy: One Trial Lawyer's View*, in THE DOCKET, vol. 9, no. 3, at 1 (Nat'l Inst. for Trial Advoc., Summer 1985); *State v. Bush*, 255 S.E.2d 539, 542 (W. Va. Ct. App. 1979) (there is a substantial relationship between time to prepare for a criminal trial and the quality of representation provided by the defense).

214. See *Goodwin v. Swenson*, 287 F. Supp. 166, 182-83 (W.D. Mo. 1968).

215. See *In re Snyder*, 734 F.2d 334, 340 (8th Cir.), *rev'd*, 105 S. Ct. 2874 (1985); *United States v. Baynes*, 687 F.2d 659 (3d Cir. 1982); *Rummel v. Estelle*, 590 F.2d 103 (5th Cir. 1979); see also Note, *Incompetency of Counsel*, 25 BAYLOR L. REV. 299, 304 (1973) (lack of pre-trial investigation and preparation is perhaps the reason most often cited by appellate courts in Texas for reversal on effective assistance grounds). But see *Strickland v. Washington*, 466 U.S. 668 (1984), which involved the defendant's claim that his attorney had not conducted a proper investigation prior to the sentencing hearing on the capital offense conviction, and where the Court found that counsel's decision not to conduct an expanded investigation represented a professionally reasonable strategic choice. The Court further noted that there must be a heavy measure of deference to counsel's decision regarding investigations.

216. See, e.g., BING & ROSENFELD, *supra* note 210, at 31 (complaints of lawyers in the Massachusetts Defenders Committee emphasize the lack of adequate preparation time); REPORT OF THE INVESTIGATIVE TEAM REPRESENTING THE ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS ON DEFENSE SERVICES IN PRINCE GEORGES COUNTY, MARYLAND (1980), reported in LEFSTEIN, *supra* note 76, at 46 ("As a result of caseload pressures, attorneys complain that they do not have adequate time to prepare for court proceedings.").

217. Maddi, *Improving Trial Advocacy: The Views of Trial Attorneys*, 1981 AM. B. FOUND. RESEARCH J. 1049, 1071-72. A study of experienced lawyers appearing in the federal district courts revealed that 45% considered inadequate advocacy by appointed criminal defense counsel to pose a "serious problem"; "failure to prepare cases to the best of ability" was cited as one of the two most frequent causes of inadequate trial performance. PARTRIDGE & BERMANT, *supra* note 76, at 16.

Judges seem to share this concern. The Advocacy Committee of the American Bar Association requested the American Bar Foundation to research the views of the judiciary on advocacy competence.²¹⁸ Once again, inadequate preparation was identified as the most prevalent form of incompetence, and more than fifty percent of those responding listed preparation as *the* most significant factor affecting competence.²¹⁹

Comprehensive preparation of a case involves an investigation of all the facts surrounding the crime.²²⁰ This usually entails visiting the scene, obtaining and examining evidence, locating and interviewing defense²²¹ and prosecution witnesses,²²² and consulting with possible experts to assist in preparing the case and possibly testifying during the trial.²²³ Courts have long recognized that "effective assistance refers not only to

218. Maddi, *supra* note 212. All state and federal judges sitting in trial courts were surveyed and 26% responded.

219. *Id.* at 144. See also PARTRIDGE & BERMANT, *supra* note 76, where federal judges cited the failure of attorneys to adequately prepare cases as one of the two most frequent causes of the inadequate trial performance of appointed criminal defense counsel appearing in the federal courts.

220. The Chairman of the ABA Litigation Section's Committee on Trial Practice has emphasized the thoroughness required:

By preparation of the advocate I mean thorough examination of each strength and weakness, each fact, each principle of law, each witness, each document, uninterrupted analysis of the consistencies and inconsistencies in the case, ability to focus on the weak parts of the case and determine how they will be met. It is complete absorption, total immersion in the case so that one's response at the time of trial can be instantaneous.

Brosnahan, *supra* note 213, at 1.

221. Ineffective assistance of counsel may be presumed when an attorney has failed to interview potentially crucial witnesses. *Eldridge v. Atkins*, 665 F.2d 228 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982); *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974). See also *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968) (ineffective assistance found where the attorney failed to interview an eyewitness to the alleged rape and to clearly inform the defendant of the elements of the charge); *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963) (failure to contact witnesses and to assert an obvious defense led to a finding of ineffective assistance).

222. Failure to interview prosecution witnesses may constitute a violation of the lawyer's constitutional obligation to render effective assistance. *Marrow v. Parratt*, 574 F.2d 411 (8th Cir. 1978). See also *Eldridge v. Atkins*, 665 F.2d 228 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982).

223. In some cases, the assistance of an expert might become as crucial as that of the attorney himself. See *Assistance to the Indigent Person Charged with Crime*, 2 GA. ST. B.J. 197, 202 (1965). Courts have often held that when facts are known or should have become known to counsel that cast a reasonable doubt on the competence or sanity of the defendant, the attorney has an obligation to seek expert advice in assisting counsel in any defense of insanity. See, e.g., *Proffitt v. United States*, 582 F.2d 854, 859 (4th Cir. 1978), *cert. denied*, 447 U.S. 910 (1980); *United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976); *Wood v. Zahradnick*, 430 F. Supp. 107, 111 (E.D. Va. 1977), *aff'd and remanded for further proceedings*, 578 F.2d 980 (4th Cir. 1978). The Supreme Court recently took note of the crucial nature of expert psychiatric assistance in its holding in *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985). See *supra* note 81.

forensic skills but to painstaking investigation in preparation for trial."²²⁴

The ABA Criminal Justice Standard 4-4.1 states that the lawyer has a duty to promptly investigate the circumstances of the case. Courts have cited and relied upon that standard in resolving appeals based on claimed ineffectiveness of counsel.²²⁵ In the ABA Criminal Justice Standards, a Commentary in Chapter 11 (Discovery and Procedure Before Trial) explains the extreme import of such a duty:

[T]he realist knows that effectiveness at trial depends upon meticulous evaluation and preparation of the evidence to be presented at trial. Where the necessary evaluation and preparation are foreclosed by lack of information, the trial becomes a pursuit of truth and justice only by chance rather than by design, and generates a diminished respect for the criminal justice system, the judiciary, and the attorney participants.²²⁶

Despite the Criminal Justice Standards and court pronouncements, caseload pressures and insufficient funding have led to widespread failings by defenders of their duty to investigate.²²⁷

224. *Wolfs v. Britton*, 509 F.2d 304, 309 (8th Cir. 1975). See also *Guelndner v. Heyd*, 311 F. Supp. 1168, 1171 (E.D. La. 1970) ("It is axiomatic that effective presentation of a case before a jury is premised on diligent and adequate trial preparation."); *Van Moltke v. Gillies*, 332 U.S. 708 (1948) (the defendant is entitled to rely on his lawyer to investigate the facts and circumstances involved in the case); *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968) (counsel must conduct legal and factual investigations to determine if matters of defense can be developed); *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970) (for the effective assistance of counsel, adequate preparation for trial may be a more important element than the forensic skill exhibited in court); *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963) (the failure to investigate, research, and prepare is equivalent to no representation at all); *Smotherman v. Beto*, 276 F. Supp. 579, 588 (N.D. Tex. 1967) (the lawyer who does not seek out all facts relevant to his client's case is prepared to do little more than stand still at time of trial).

225. See, e.g., *Pickens v. Lockhart*, 714 F.2d 1455, 1460 (8th Cir. 1983); *Taylor v. Hilton*, 563 F. Supp. 913, 918-19 (N.J. 1982); *People v. Pope*, 23 Cal. 3d 412, 424, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979); *State v. Jury*, 19 Wash. App. 256, 263-64, 576 P.2d 1302, 1307 (1978); *State v. Perez*, 99 Idaho 181, 184, 579 P.2d 127, 129 (1978); *Kimbrough v. State*, 352 So. 2d 925, 928 (Fla. Dist. Ct. App. 1977); *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974); *People v. White*, 182 Colo. 417, 421, 514 P.2d 69, 71 (1973).

226. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 46, Commentary to Standard 11-1.1.

227. See, e.g., THE NATIONAL CENTER FOR DEFENSE MANAGEMENT EVALUATION OF THE PUBLIC DEFENDER SYSTEM IN GREENVILLE, SO. CAR. (1978), *reported in* LEFSTEIN, *supra* note 76, at Appendix F-48 (inadequate trial preparation, minimal use of pretrial discovery procedures, and ineffective use of expert testimony were the results of excessive caseload pressures); THE REPORT OF THE INVESTIGATIVE TEAM REPRESENTING THE ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS ON DEFENSE SERVICES IN PRINCE GEORGES COUNTY, MARYLAND (1980), *reported in* LEFSTEIN, *supra* note 76, at 46 (lawyers often represented defendants with virtually no preparation); REPORT OF THE INVESTIGATIVE TEAM REPRESENTING THE ABA STANDING COMMITTEE EVALUATING THE SAN FRANCISCO PUBLIC DEFENDER OFFICE (1980), *reported in* LEFSTEIN, *supra* note 76, at 35 (attorneys often do not have sufficient time to conduct investigations); NATIONAL CENTER

B. Insufficient Consultation with the Client

The ability to conduct a thorough investigation is also hindered by the lawyer's lack of time to fully consult and communicate with his client. If a lawyer cannot ascertain from his client all the details concerning the event, his investigation will suffer. The indigent defendant may view his defender at first with suspicion since the same source of funds that is paying the police to arrest him and the prosecutor to prosecute him, is also paying for his counsel.²²⁸ The defender needs to win over the trust and confidence of the defendant,²²⁹ but the hurried attorney anxiously wishing to conclude the interview so that he can go to the next court and see other defendants, is not likely to invite and encourage his client's trust.²³⁰

Proper consultation requires that the lawyer keep his client fully informed of the progress of preparing the defense. In 1879, the Supreme Court recognized that "it is the duty of the attorney to advise the client

FOR DEFENSE MANAGEMENT, ASSESSMENT OF INDIGENT DEFENSE SERVICES IN JACKSON COUNTY, OREGON (1978), reported in LEFSTEIN, *supra* note 76, at Appendix F-52 (investigation commonly is not performed); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, TENNESSEE COURT STUDY: DEFENSE SYSTEM STUDY (1977), reported in LEFSTEIN, *supra* note 76, at Appendix F-52 (preparation often proceeds without investigation and expert testimony); CRIMINAL DEFENSE TECHNICAL ASSISTANCE PROJECT, ABT ASSOCIATES, INC., THE PUBLIC DEFENDER SYSTEM IN MARION COUNTY, INDIANA (1980), reported in LEFSTEIN, *supra* note 76, at Appendix F-16 (caseloads in the court systems studied were found to be too large to allow a reasonable amount of preparation in any given case).

228. In 1970-71, a study of defendants in Connecticut revealed that most perceived of their state-paid defenders as middlemen or as prosecutors' assistants. Casper, *supra* note 202, at 4. Defendants are not alone in viewing such a system with alarm. Judge Edward Dimock warned, prior to the emergence of many public defender systems, that "[w]e should never yield one inch of ground in the struggle against a police state where the government, when it prosecutes a man, purports also to defend him." Dimock, *The Public Defender: A Step Towards a Police State?* 42 A.B.A. J. 219, 220 (1956). See also Sudnow, *Normal Crime: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255 (1965) (observation of a public defender office in California led to the conclusion that whereas the private attorney's primary focus was on his client, the defender's concern was the perpetuation of his relationship with other functionaries in the courtroom); Platt, *In Defense of Youth*, *supra* note 201, at 631 ("the Court's functionaries see themselves as colleagues rather than as adversaries. . .").

229. See *Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982) ("Basic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel."); *Lee v. United States*, 235 F.2d 219, 221 n.5 (D.C. Cir. 1956) (attorney-client relationship demands personal faith and confidence so that they can work together harmoniously). Even an unpleasant lawyer-client relationship does not relieve the lawyer of his duty to communicate with his client. *State Bar v. Watkins*, 655 P.2d 529, 530 (Nev. 1982).

230. Professor Beany in Beany, *Right to Counsel*, THE RIGHTS OF THE ACCUSED IN LAW AND ACTION 147 (S. Nagel ed. 1972), has observed that "the instances where the public defender must ask the bailiff who the defendant is, and then quickly takes him out to the hall to confer are all too numerous." *Id.* at 168.

promptly whenever he has any information to give which . . . the client should receive."²³¹ Additionally, courts have emphasized the importance of frequent and meaningful communication between the defendant and his attorney.²³² Consequently, courts have found ineffective assistance when attorneys have failed in this responsibility.²³³

The ABA Criminal Justice Standards 4-3.6 and 4-3.8 require the lawyer to keep his client informed. Nevertheless, evaluations of defense systems have found grossly inadequate communication between attorney and client.²³⁴ It appears that indigent clients are not receiving equal jus-

231. *Baker v. Humphrey*, 101 U.S. 494, 500 (1879). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 44, EC 9-2: "In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

232. See, e.g., *Hawk v. Olson*, 326 U.S. 271, 278 (1945) (the Fourteenth Amendment is violated when there is no opportunity for the defendant to consult with his defender after indictment and arraignment); *Tompkins v. State of Missouri*, 323 U.S. 485, 489 (1945) (informed, knowledgeable advice from the attorney is needed to overcome a client's bewilderment or ignorance); *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974) (the client must understand how the applicable statutory provisions of the law relate to the facts of his case); *Braxton v. Peyton*, 365 F.2d 563, 564 (4th Cir.), *cert. denied*, 385 U.S. 939 (1966) (the assigned lawyer should confer with his client without undue delay and as often as necessary to inform him of his rights); *State ex rel. Dehning v. Rigg*, 251 Minn. 120, 122, 86 N.W.2d 723, 726 (1957) (assistance of counsel requires consultations that are, at a minimum, sufficiently adequate to inform the defendant of his rights); *In re Colson*, 632 S.W.2d 470 (Mo. 1982) (the duty to communicate derives from the overall obligations of the lawyer to his client); *In re Bretz*, 168 Mont. 23, 542 P.2d 1227 (1975) (the client cannot properly make decisions affecting his case unless the lawyer has communicated with him); *In re Ratzel*, 108 Wis. 2d 447, 321 N.W.2d 543 (1982) (it is the duty of the lawyer to communicate all material facts and problems affecting the client).

233. See, e.g., *Turner v. Maryland*, 318 F.2d 852, 853-54 (4th Cir. 1963) (attorney's failure to communicate with his client during the two weeks before trial constituted "deplorable disregard" of his client and risked overlooking significant helpful information which the defendant might have in his possession); *Windom v. Cook*, 423 F.2d 721 (5th Cir. 1970) (counsel had not discussed the elements of the crime nor discovered from the defendant the facts of the case).

234. See, e.g., THE NATIONAL CENTER FOR DEFENSE MANAGEMENT EVALUATION OF THE PUBLIC DEFENDER SYSTEM IN GREENVILLE, SOUTH CAROLINA (1978), reported in LEFSTEIN, *supra* note 76, at Appendix F-48 (finding that excessive caseloads have resulted in insufficient attorney-client contact); THE REPORT OF THE INVESTIGATIVE TEAM REPRESENTING THE ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT ON DEFENSE SERVICES IN PRINCE GEORGES COUNTY, MARYLAND (1980), reported in LEFSTEIN, *supra* note 76, at 46 (found that there was frequently no advance communication between an attorney and his client charged with a misdemeanor in the District Court); THE NATIONAL CENTER FOR DEFENSE MANAGEMENT STUDY OF INDIGENT DEFENSE SERVICES IN SAGINAW COUNTY, MICHIGAN (1977), reported in LEFSTEIN, *supra* note 76, at Appendix F-36 (found that attorneys often fail to contact clients promptly, and rarely visit clients in jail); see also, NATIONAL CENTER FOR DEFENSE MANAGEMENT, SYSTEMS DEVELOPMENT STUDY OF INDIGENT DEFENSE DELIVERY SYSTEMS FOR STATE OF SOUTH DAKOTA (1977), reported in LEFSTEIN, *supra* note 76, at Appendix F-50 (counsel were believed to be devoting insufficient time to consulting with and listening to clients); NATIONAL CENTER FOR DEFENSE MANAGEMENT, STATE OF KANSAS, SYSTEMS DEVELOPMENT STUDY (1978), reported in LEFSTEIN, *supra* note

tice with those who pay well for an attorney's time and who, in return, receive counsel's consultation, attention, and communication.²³⁵ Moreover, when defendants are incarcerated pretrial, caseload pressures may well prohibit the defender from having time available to go to the jail to consult with his client.²³⁶

C. Improper Plea Bargaining

The significance of counsel's failure to adequately investigate and communicate with his client is revealed in an examination of the plea bargaining process. The entry of a guilty plea is a critical stage of the

76, at Appendix F-20 (counsel were appointed only after the first court appearances and visits to the jail by counsel to consult with their clients were infrequent).

235. Professor Casper, in J. CASPER, *AMERICAN CRIMINAL JUSTICE, THE DEFENDANT'S PERSPECTIVE* (1972), examined the relationship between public defenders and their clients and concluded that: "This relationship leads most defendants . . . [to] wonder whether 'their' attorney is on their side. He doesn't spend much time with them; he doesn't seem concerned with them as persons; rather, he is concerned with the disposition." *Id.* at 17. In sharp contrast to this is Professor Casper's analysis of the relationship that defendants have with private attorneys:

An entirely different area surrounded the defendant's notions of his relationship with his attorney. In part, this sense of greater satisfaction was the product of different behavior by their attorney. Enjoying substantially lighter caseloads, the private attorney was reported to have spent much more time with his client. Unlike the public defenders, the private attorneys were reported to have visited clients in jail and to have spent time discussing the case with the client.

Id. at 115-16. A survey of California Superior and Municipal Court Judges in San Diego contrasted the services provided to indigent defendants with those received by defendants having retained private counsel, and revealed that Superior and Municipal Court Judges perceived that private counsel "handled their clients" more adequately and that clients' satisfaction with their defense services was greater. HUGHES, HEISS AND ASSOCIATES, *A PLAN FOR PROVIDING INDIGENT DEFENSE SERVICES IN SAN DIEGO COUNTY 70-71, 76-77* (1977). A study of prisoners in a Florida jail, contrasting the representation given by public defenders to that of private counsel, found that the public defenders' repeated failure to fully communicate and keep clients informed caused clients to feel as if they were arbitrarily processed through the system without being heard. In addition, the prisoners believed that the "private attorney is more responsive to the psychological needs of clients while the public defender may consider such considerations as relatively immaterial since the client pays no fees (except taxes generally) and lacks the time to conduct such 'stroking' activities." Berger & Handberg, *supra* note 201, at 115. The study further found that after the first meetings between attorneys and their clients, 71% of defendants with private lawyers felt the lawyer would help them whereas only 36% of defendants represented by public defenders so believed. The researchers explained that, "The disparity in first impressions may reflect the private attorney's ability to appear more 'interested' in the client while the public defender tends toward greater impersonality given greater case load." *Id.* Ninety-three percent of those who had private counsel would choose to be represented by private counsel again, whereas only 15% of those who had public defenders would choose public defenders again. *Id.*

236. See, e.g., Brief of Amicus Curiae of the Association of Legal Aid Attorneys of the City of New York, at 12, *Wallace v. Kern*, No. 73-1826 (2d Cir. June 27, 1973) (caseloads of Legal Aid lawyers were so excessive that virtually no interviews were held with jailed defendants because lawyers had insufficient time to visit the jail facility).

proceedings and requires effective²³⁷ and competent counsel.²³⁸ It involves the defendant's waiving the right to confront witnesses,²³⁹ the right to challenge the introduction of evidence to be used against him,²⁴⁰ and the right to a trial by a jury of his peers.²⁴¹ The Supreme Court has upheld the constitutionality of the plea bargaining process,²⁴² and recognized that it is an indispensable aspect of the criminal justice system.²⁴³

ABA Criminal Justice Standard 4-6.1 warns the defense attorney that "[u]nder no circumstances should a lawyer recommend to a defendant acceptance of a plea unless a *full investigation* and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."²⁴⁴ Since any informed decision to plead guilty must consider the likelihood of conviction were the case to go to trial, investigation is needed to accurately determine the strength of the prosecution's case.²⁴⁵ Counsel, therefore, needs to speak to witnesses, investigate possible defenses, and examine instances of possible police misconduct that could lead to a successful motion to suppress evidence that would be needed to convict the defendant. Research into relevant case law regarding the offense charged may also be required because the defendant's belief that he is guilty *in fact* may not coincide with the elements of the statute that must be proven in order to establish guilt as a

237. *United States ex rel. Healey v. Cannon*, 553 F.2d 1052, 1056-57 (7th Cir.), *cert. denied*, 434 U.S. 874 (1977) (a guilty plea entered without effective assistance of counsel is invalid).

238. *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (the advice of counsel regarding plea considerations must be "within the range of competence demanded of attorneys in criminal cases.").

239. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

240. *McMann v. Richardson*, 397 U.S. at 770-71.

241. *Brady v. United States*, 397 U.S. 742, 748 (1970).

242. *Id.* at 749-55.

243. *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Santobello v. New York*, 404 U.S. 257, 260-61 (1971). Plea bargaining is a procedure now accepted and regulated by the ABA Criminal Justice Standards (*supra* note 46, Chapter 14, Pleas of Guilty), the Model Code of Pre-Arrest Procedure (ALI, MODEL CODE OF PRE-ARREST PROCEDURE 350.3 (1975)), the Uniform Rules of Criminal Procedure (NCCUSL, UNIFORM RULES OF CRIMINAL PROCEDURE 443 (1975)), and the Federal Rules of Criminal Procedure (FED. R. CRIM. P. 11). *But see* NATIONAL ADVISORY COMMISSION, TASK FORCE REPORT: THE COURTS, STANDARD 3.1 (1973), (stating that "as soon as possible, but in no event later than 1978, negotiations between prosecutors and defendants . . . concerning concessions to be made in return for guilty pleas should be prohibited.")

244. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 46, Standard 4-6.1(b) (emphasis added). See also *id.* Standard 4-4.1, stating that "[t]he duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty."

245. See, e.g., *McLaughlin v. Royster*, 346 F. Supp. 297, 300 (E.D. Va. 1972) (the plea bargaining process "contemplates the pursuit by counsel of factual and legal theories in order to reach a conclusion as to whether a contest would best serve the attorney's client's interest.").

matter of law.²⁴⁶ Information discovered from investigation which may reveal unexpected weaknesses in the prosecution's case may then be used during plea negotiations to attain a more favorable plea than would otherwise have been possible.²⁴⁷

The decision to plead guilty and not risk trial is for the defendant to make after consultation with his lawyer.²⁴⁸ This necessitates that the lawyer spend time with the defendant, communicating all he has learned of the strength of the prosecution's case and the applicable issues of law, and advising his client of the possible effect of each legal alternative.²⁴⁹ Courts have held that the following constitute ineffective assistance of counsel: When a defendant pleads guilty without a full explanation of the consequences of the plea;²⁵⁰ when counsel, without familiarizing himself with the facts of the case or investigating possible defenses, allowed his client to plead guilty;²⁵¹ when counsel failed, prior to the entry of the plea, to investigate and utilize governmental records which were exculpatory;²⁵² and when a guilty plea was entered on the same day that a lawyer

246. The Commentary to Standard 4-6.1 governing plea bargaining states:

In all circumstances, defense counsel should challenge the government's case if there is genuine doubt that the prosecution can carry its burden of proof. That the accused is guilty in fact is, of course, not relevant. It is not the function of the advocate to make a moral judgment as to the guilt of the accused.

STANDARDS FOR CRIMINAL JUSTICE, *supra* note 46, Commentary to Standard 4-6.1, p. 4.73.

247. A survey of defense lawyers in Phoenix, Arizona indicated that lawyers who interview the victims of the alleged crime have greater success in obtaining a reduction of the charge as part of the negotiated plea. They also had a better chance of persuading prosecutors to recommend more lenient sentences than did defense counsel who had not interviewed the victim. Comment, *Investigation of Facts in Preparation for Plea Bargaining*, 1981 ARIZ. ST. L.J. 557, 574. Biskind's trial manual indicates that the skill with which a defense lawyer has investigated and prepared his case determines to a large extent the success of any plea negotiation. E. BISKIND, *HOW TO PREPARE A CASE FOR TRIAL* 71 (1954).

248. See MODEL RULES OF PROFESSIONAL RESPONSIBILITY, *supra* note 45, EC 7-7 ("the authority to make decisions is exclusively that of the client, and if made within the framework of the law, such decisions are binding on his lawyer. . . ."); see also *id.*, Rule 1.2(a) ("in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered. . . .").

249. See *id.*, EC 7-8 ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations."); *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974) (the client must be counseled as to how the applicable statutory provisions of the law relate to the facts of the defendant's case); *Murray v. Florida*, 384 F. Supp. 574 (S.D. Fla. 1974) (the client must be informed of plea proposals made by the prosecution).

250. See, e.g., *Bell v. Alabama*, 367 F.2d 243, 247 (5th Cir. 1966), *cert. denied*, 386 U.S. 916 (1967).

251. *Mason v. Balcom*, 531 F.2d 717 (5th Cir. 1976). See also *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973).

252. *United States v. Norman*, 412 F.2d 629 (9th Cir. 1969). But see *State v. Nielsen*, 547 S.W.2d 153 (Mo. App. 1977) (the issue of ineffectiveness of counsel after a plea is proper only as to the issues of voluntariness and understanding of the plea).

initially consulted with his client, leading to a presumption that there had been an inadequate preparation of a defense.²⁵³

In many public defender offices the caseload of the staff attorney is so great that in order for the attorney to "process" all his cases, he must recommend to many of his clients that they plead guilty. That guilty plea is not usually the climax of a long and thorough investigation conducted by counsel. Rather, it can be a mechanism for relieving the defender of the need to prepare that case. As a study of the plea bargaining process in Boston revealed, "the MDC [Massachusetts Defenders Committee] uses plea bargaining freely, to obtain the defendant's freedom while avoiding the time necessary to provide a full defense at trial For the Massachusetts Defenders Committee, plea bargaining becomes a *necessary technique to deal with an overwhelming caseload*."²⁵⁴ Similarly, an evaluation of a public defender office in Ohio found a "high rate of negotiated pleas which is *critical to the survival of the public defender office* at the present caseload ratios."²⁵⁵ The resources of many defender offices are insufficient to provide for the trial of more than a small fraction of the cases handled. A nationwide study involving 399 defender agencies focusing in part on plea bargaining, concluded:

The larger the area served by the agency, the more excessive the caseloads. Caseload pressures coincide with inadequate preparation time. Also, as attorney caseloads increase, so do guilty plea rates. Agencies that report low guilty plea rates (under 20%) all have average attorney caseloads of less than 50 cases per year. Attorney caseloads, therefore, appear to be a factor in guilty plea rates.²⁵⁶

Indigent defendants, entitled to vigorous counsel investigating their cases and preparing their defenses for trial, instead may be represented by counsel, who for lack of adequate time to devote to their cause, are

253. *Bryant v. Peyton*, 270 F. Supp. 353, 358 (D. W.Va. 1967) (when a plea quickly follows the initial consultation there may be a suspicion either of neglect or that the guilty plea was prompted by the pressure of time, preventing full preparation of defense).

254. BING & ROSENFELD, *supra* note 210, at 32 (emphasis added); *see also* Blumberg, *The Practice of Law as Confidence Game*, 1 LAW AND SOC'Y REV. 15, 38 (June 1967) (insufficient time to handle caseloads pressures legal aid counsel to suggest a plea of guilty at the initial interview with the defendant).

255. OHIO PUBLIC DEFENDER COMMISSION AND THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION, REPORT ON THE REPRESENTATION AFFORDED INDIGENT PERSONS IN FELONY CASES, ERIE COUNTY, OHIO 6 (1982) (emphasis added).

256. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, INDIGENT DEFENSE SYSTEMS ANALYSIS (1978), summarized in LEFSTEIN, *supra* note 76, at Appendix F-1. *See also* GIDEON UNDONE, *supra* note 186 (inadequate compensation puts pressure on appointed counsel to plead their cases out as quickly as possible).

advising them to plead guilty.²⁵⁷

D. Insufficient Input into the Sentencing Process

Sentencing is also a stage of the proceeding where the indigent defendant is likely to be disadvantaged by his defender's lack of time. The Supreme Court in *Mempa v. Rhay*²⁵⁸ held that sentencing was a critical stage of a criminal prosecution at which the defendant was guaranteed counsel to assist "in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence."²⁵⁹ Sentencing has been referred to by one circuit court of appeals as the stage which "may well be the most important part of the entire proceeding."²⁶⁰ Counsel, therefore, must have sufficient time to prepare argument for the sentencing judge.²⁶¹ Yet, supervisors of defender offices, anxious to insure that each attorney processes as many cases as possible, often discount the import of the work and time required to prepare for the sentencing hearing.²⁶²

257. See REPORT OF THE INVESTIGATIVE TEAM REPRESENTING THE ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS EVALUATING THE SAN FRANCISCO COUNTY PUBLIC DEFENDER OFFICE (1980), reported in LEFSTEIN, *supra* note 76, at 35 (the public defender attorneys interviewed acknowledged that due to lack of time, cases that probably should have been tried terminated instead with the client pleading guilty on advice of counsel); see also D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 158 (1968) (private lawyers generally plead their clients guilty less often and take more of their cases to trial than do public defenders); L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 53-55 (1965) (a study of thirty counties in fourteen states found that clients of public defenders consistently pled guilty more often than clients of private attorneys, and in twenty-six of twenty-eight counties the clients of public defenders were sentenced to jail more often and received more severe sentences). Professor Casper, in AMERICAN CRIMINAL JUSTICE, THE DEFENDANT'S PERSPECTIVE, *supra* note 235, described what he found to be the relationship between the public defender and his client:

Public defenders . . . are greatly overburdened, handling a volume of cases far beyond their capacity to give anyone sufficient personal attention The conversations are brief; they center not around the circumstances and motives of the crime, potential legal defenses, defendant's needs and desires, but around the "deal"—what can be obtained in return for a guilty plea.

Id. at 16-17.

258. 389 U.S. 128 (1967).

259. *Id.* at 135. See also *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (for a reasonably competent lawyer to render effective assistance, he must discharge his duties at sentencing).

260. *United States v. Pinkney*, 551 F.2d 1241, 1249 (D.C. Cir. 1976).

261. *United States v. DiNapoli*, 519 F.2d 104 (6th Cir. 1975).

262. An example of this can be seen from the response of one supervisor to a staff attorney's claim that he had too many cases to work on and still be able to provide effective assistance. The supervisor, in examining the case files of the complaining attorney to ascertain the total amount of work needing to be done, "was not particularly interested in the sentencing cases. . . ." In the Matter of the Arbitration between the Association of Legal Aid Attorneys

A survey comparing the representation provided at the sentencing stage by public defenders with that of private counsel in Phoenix, Arizona reveals the impact of a heavy caseload.²⁶³ That study found that privately retained counsel were almost twice as likely as public defenders to arrange a meeting with the probation officer who was preparing a sentencing memorandum for the court. Private counsel more often submitted written statements on behalf of their clients to the probation officer, were more active in seeking out family and friends of their client to submit letters of support, more often spent time preparing their clients for the interview with the probation officer, and more often attempted to verify the accuracy of questionable information found in the probation

of the City of New York and the Legal Aid Society, Suspension of Steven Leventhal, Opinion and Award, American Arbitration Association Case Number 1330-1350-82, at 20 (1983).

The attorney must present to the court not just broad-based generalized appeals for mercy, but rather specific information concerning the defendant's background, family ties and responsibilities, employment history and prospects (including any statement from potential or past employers willing to hire the defendant were he not to be incarcerated), educational background, and mitigating circumstances concerning the offense committed. Additionally, the attorney should report detailed information concerning the defendant's prior criminal record which may act to diminish its overall impact and severity. In appropriate cases, he should present specific plans for alternatives to incarceration, such as drug rehabilitation programs, which may alleviate the judge's concerns that would otherwise lead him to incarcerate the defendant. Counsel needs to spend time with the Probation Officer who may be preparing a sentencing report for the judge and arrange for the defendant's family, employers, and drug program officials to communicate with the probation officer. See *Russell v. Jones*, 647 P.2d 904 (Ore. 1982) (the Supreme Court of Oregon held that the pre-sentence interview by the probation investigator preparing the report for the judge was a stage of the proceeding at which there was a right for the defendant to have the assistance of counsel). For a strong statement and rationale of the needs for defense counsel to be present at the pre-sentence interview, see Kuh, *Trial Techniques: Defense Counsel's Role in Sentencing*, 14 CRIM. L. BULL. 434, 435 (1978); see also STANDARDS FOR CRIMINAL JUSTICE, *supra* note 46, Standard 18-5.4(a), concerning the obligation of counsel to rebut any information in the probation officer's report that is either unverified or derogatory to the defendant; NCCUSL, MODEL SENTENCING AND CORRECTIONS ACT 3-206 (1979), enabling defense counsel to get a postponement of at least ten days after the filing of the probation department's sentencing report. The effect of the Probation Report may well be long-lasting and must be carefully scrutinized by counsel as it is often relied upon by parole boards in determining when the defendant should be released from prison. See *Dickey, The Lawyer and the Accuracy of the Pre-sentence Report*, 43 FED. PROBATION 28, 33 (June 1979). Additionally, it will often prove wise for defense counsel to prepare his own pre-sentence report as the probation officer may be unsympathetic or overworked which may result in his placing undue reliance on police department records and the prosecutor's summary report. The request that family and job sources report to the probation office may be a difficult one to meet, whereas the attorney, himself, can go and seek out helpful parties. Such counsel-prepared pre-sentence reports are becoming increasingly accepted. See, e.g., NEW YORK CRIM. PROC. LAW 390.40 (McKinney 1971) (specifically permitting such memoranda).

263. Comment, *Adequacy of Criminal Defense Lawyers' Preparation for Sentencing*, 1981 ARIZ. ST. L. J. 585.

report.²⁶⁴ The same caseload pressures on the defender which inhibit effective investigations, case preparation, and consultations with the client, also inhibit counsel from attempting that which, albeit time-consuming, may be of great help to their clients at the time of sentencing.²⁶⁵

VIII. The Impact of the Underfunding of Defender Offices on the Adversary System

The underlying premise of our justice system's reliance on the adversary system is the expectation that an effective, diligent counsel will present to the courts the most impressive statement of facts, testimony of witnesses, and analysis of precedent in support of his client's position. If either side is so disadvantaged, underfunded, or overburdened that it cannot function in this expected manner, then the adversarial process has failed.²⁶⁶

On a per capita basis, indigent defense spending nationwide represents less than three percent of all justice spending.²⁶⁷ The prosecution receives almost four times the amount of funds spent by state and local governments on indigent defense.²⁶⁸ Additionally, monies spent on the preparation of the prosecutor's case, which are officially classified as police expenditures and not counted as part of the prosecutor's budget (e.g., police laboratory analyses, police chemists testifying as expert witnesses,

264. *Id.* at 611-18.

265. See NATIONAL CENTER FOR DEFENSE MANAGEMENT, ASSESSMENT OF INDIGENT DEFENSE SERVICES IN JACKSON COUNTY, OREGON (1978), reported in LEFSTEIN, *supra* note 76, at Appendix F-42 (the "assembly-line justice" found to exist results in rapid pleas and inadequate preparation particularly for sentencing hearings); NATIONAL CENTER FOR DEFENSE MANAGEMENT, SYSTEMS DEVELOPMENT STUDY OF INDIGENT DEFENSE DELIVERY SYSTEMS FOR STATE OF SOUTH DAKOTA (1977), reported in LEFSTEIN, *supra* note 76, at Appendix F-51 (defenders do little to effectively prepare for sentencing and fail to pursue alternative sentencing arrangements).

266. See THE REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 6 (1963) (insofar as the financial status of the accused impedes vigorous and proper challenges, there is a threat to the viability of the adversarial system).

267. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, CRIMINAL DEFENSE SYSTEMS 7 (1984).

268. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 1980 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 11 (1981). The disparity between the funding of prosecutor and defender offices is illustrated by the statement of the Public Defender for Montgomery County, Maryland, upon his resignation:

I guess that one of my major reasons for leaving the public defender's office and entering private practice was to get away from all the frustration. We're really hurting. When the prosecutor's office asks for money to increase their efficiency, the purse strings open wide. When we ask for money everything closes shut.

Public Defenders: Small Staffs, Heavy Caseloads Plague Lawyers for the Poor, Washington Post, Sept. 6, 1979, at 1, col. 1.

and police investigators assigned to prosecutors' offices) can overwhelm the defense's resources.²⁶⁹ Yet, some believe it inadvisable for public defenders to receive funds equal to those of their adversaries. After acknowledging the inequality in funding, the President of Harvard University, in his analysis of the state of the legal profession, commented:

[I]f Congress provided enough funds for legal aid, or if it agreed to offer the same support to legal defenders as it gives the prosecution, it could easily touch off a burst of litigation that would cost huge sums of money and add heavily to the burdens and delays of the legal system.²⁷⁰

If one expects the confrontation between adversaries to lead to a reliable determination by the factfinder, each side must be relatively balanced in assets, time, and assistance. Moreover, when those required to refute a serious accusation are denied the tools of the contest, their confidence in the fairness and equity of the result diminishes.²⁷¹

IX. The Providers of Defense Services Respond to Inadequate Funding: Two Examples

A. The Zone Defense

Public Defender offices may respond to inadequate financing and the resultant insufficient staffing by instituting sequential, or stage representation, which is also referred to as horizontal representation or the "zone defense." The defendant encounters a new attorney at every stage of his case since the attorneys are assigned to courtrooms, not to clients. Such representation is economical for the office since, for example, the attorney who is assigned to the court part for arraignments handles all the cases for that day in that part, whereas another lawyer may be in the

269. The Public Defender of Prince Georges County, Maryland, stated in regard to his staff of ten defenders: "To be on par with the prosecutor's staff, we'd have to have 21 attorneys. . . . Then, too their office gets support from the local police, the FBI, crime labs and all other kinds of state, local and federal agencies. How do you play catch up against a team like that?" *Id.* The President of the Association of Legal Aid Attorneys in New York City has written of the conditions facing defense attorneys in Brooklyn, New York: "An attorney functioning under these conditions is in no position to oppose the will of the state effectively; rather than being an effective adversary to the state, he is another cog in 'the system that isn't working.'" Brief of Amicus Curiae, Association of Legal Aid Attorneys, at 13, in *Wallace v. Kern*, 481 F.2d 621 (2d Cir. 1973).

270. Bok, *A Flawed System of Law Practice and Training*, 33 J. OF LEGAL EDUCATION, 570, 575 (1983) (citation omitted).

271. See *Thomas v. Wyrick*, 535 F.2d 407, 413 (8th Cir.), cert. denied, 429 U.S. 868 (1976) (failure to provide effective assistance is a fundamental constitutional error that undermines the entire adversary process); *Caraway v. Beto*, 421 F.2d 636, 637-38 (5th Cir. 1970) (our adversary system cannot serve its function unless the accused's counsel conducts the required investigation and presents an intelligent and knowledgeable defense).

motion part and handle all the motions for that day for every client the office represents.

The client, however, never feels he has "a lawyer" because his lawyer always changes. Moreover, the quality of representation certainly suffers because no lawyer takes full responsibility for planning a defense, time is lost in contacting witnesses, and communication between a client and his attorney are impeded.²⁷² The assembly-line mentality that results diminishes job satisfaction and aggravates the problems of turnover and loss of experienced attorneys.²⁷³

A federal district court, while reversing a defendant's conviction on ineffective representation grounds, noted the saga of that individual lost in the maze of sequential representation:

[P]etitioner was assigned Legal Aid counsel and an attorney named Richter, whom he never saw again, spoke to him hurriedly on that occasion. Petitioner was remanded then, and has been locked up ever since.

From the morning of October 18 until December 15, no lawyer came to speak to petitioner about his plight. He was indicted on November 1. . . . Thereafter, he came to court several times to hear that his case was being postponed, evidently "represented" for these purposes by a series of Legal Aid attorneys, but never having an opportunity to consult with any of them.

On March 11, 1968, a Legal Aid attorney, whose name we do not know, handled a calendar call of petitioner's case and told him that a new staff attorney, William Harrison, had been assigned to

272. A description of the way this system works in one county in Maryland clearly illustrates the problems that result:

[T]he procedural material for providing representation is a "duty-day" system. Normally, this means that the lawyer does not know prior to coming to court the cases that he or she will represent. Typically, the cases on the court docket are of two types: new cases that have not previously been in court, and old cases that have been in court earlier and were continued until the lawyer's duty day. Since frequently there is no advance communication with clients, duty-day lawyers often represent defendants with virtually no preparation. As one public defender explained, there is no opportunity to investigate, plan strategy, or subpoena witnesses.

ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, DEFENSE SERVICES IN PRINCE GEORGES COUNTY, MARYLAND (1980), reported in LEFSTEIN, *supra* note 76, at 46. See also Gilboy & Schmidt, *Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants*, 70 J. CRIM. L. & CRIMINOLOGY 1, 1-2 (1979) (the stage representation given indigents by the Chicago Public Defenders Office resulted in inadequate case preparation, lost opportunities to contact witnesses, and gaps in legal representation leaving the defendant without assistance of counsel at critical stages of the case).

273. See Platt & Pollock, *Channeling Lawyers: The Careers of Public Defenders*, 9 ISSUES IN CRIMINOLOGY 1, 26-27 (1974) (the fragmentation resulting from handling only one stage of a criminal case may lead to public defenders perceiving their work as meaningless since they have no overall view of the system); KRANTZ & SMITH, *supra* note 193, at 220 (lawyers who function in stage representation system may have lower morale as a result); see also, LEFSTEIN, *supra* note 76, at F-48.

represent him. According to the pertinent court record, petitioner's case was marked "ready" for trial at the time of that March 11 call, but neither Mr. Harrison nor anyone else even supposedly knowledgeable was present to handle the matter, and another of many adjournments was ordered.

Still unaware of what, if anything, was being done for him, petitioner drafted a paper for move of relief of the Legal Aid Society and assignment of different counsel. He wrote: "I have been locked up for five months and each time I come back to court I have another lawyer handling my case." At the cursory oral hearing of his motion on March 22, 1968, asked why he was dissatisfied, petitioner said: "It seems to me that they are not interested at all."²⁷⁴

The defender who must stay all day, day after day, in the same courtroom, is not likely to risk antagonizing the judge or the prosecutor in the name of zealous representation of his client.²⁷⁵ The desire for pleasant, amiable working conditions may well lead the defender to act in harmony with his fellow "employees."²⁷⁶ One study of the Public Defender office in Denver found certain defenders to be so compatible with the judges of the court to which they were assigned that the relationship was termed a "marriage."²⁷⁷

The National Study Commission on Defense Services in 1976 condemned sequential representation and Standard 5.11 of the Guidelines for Legal Defense Systems called for continuity of representation by one

274. *United States ex rel. Thomas v. Zelker*, 332 F. Supp. 595, 596-98. (S.D.N.Y. 1971). Fourteen years later, lack of continuous representation was an apparent cause for an individual to spend three months in jail for a crime he was not charged with. A man named Willie Jones, who was, however, not *the* Willie Jones in a pending prosecution in the Manhattan Supreme Court, informed a succession of Legal Aid Society lawyers appearing to represent him that he was not the right defendant. The lawyers, refusing to believe the protests, merely offered Mr. Jones the prosecutor's plea bargain for a reduced sentence in exchange for a guilty plea. The error was discovered only on the day of trial when the lawyer appearing was the same lawyer who had represented the proper Willie Jones upon his arraignment, and realized that the wrong man was about to be tried. *The Wrong Willie Jones Spends Three Months in Jail*, N.Y. Times, Nov. 30, 1985, at 1, col. 2.

275. For example, the defender may quite legitimately believe that the interests of *future* clients might well be harmed if he persists in pursuing, for one defendant, a claim that the judge considers to be unworthy and ill-advised.

276. A comment by a public defender in Chicago illustrates the atmosphere that can develop: "It's our court . . . It's like a family. Me, the prosecutor, the judges, we're all friends. I drink with the prosecutors. I give the judge a Christmas present, he gives me a present." Goldman & Holt, *How Justice Works: The People vs. Donald Payne*, Newsweek, March 8, 1971, at 29.

277. Note, *Comparison of Public Defenders' and Private Attorneys' Relationship with the Prosecution in the City of Denver*, 50 DEN. L. J. 101, 109 (1973).

lawyer of a client's case from arraignment through sentencing.²⁷⁸ The defender's sense of accountability and authority is diminished when he only represents his client for one aspect of the criminal process.²⁷⁹

B. The Contract System

As state and county governments have cut back in recent years in funding for indigent defense services, a new form of delivery of defense services, the contract system, has rapidly emerged.²⁸⁰ In the most typical form of contract system, the county contracts out the representation of indigent defendants to whatever group of lawyers bids the lowest, a procedure not unlike that commonly utilized for awarding contracts for the building of roads and sewers.²⁸¹ The attorneys selected, offering to accept a small overall fee for handling a large volume of cases, are often unable to provide even a semblance of the constitutionally mandated quality of representation.²⁸² The contract period is generally only for

278. NLADA, REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976) [hereinafter cited as NLADA REPORT]. Standard 5.11 reads in part:

Defender offices should provide for continuous and uninterrupted representation of eligible clients from initial appearance through sentencing up to, but not including, the appellate and post-conviction stages by the same individual attorney. Defender offices should urge changes in court structure and administration to reduce fragmentation and to facilitate continuous representation.

See also STANDARDS FOR CRIMINAL JUSTICE, *supra* note 46, Standard 5-5.2, which similarly calls for continuity of representation. The Commentary to that standard characterizes the disadvantages of the zone defense, "particularly in human terms," as substantial.

279. For further analysis of the inadequacies of the zone defense, see NLADA REPORT, *supra* note 278 at 462-470; see also Gilboy & Schmidt, *supra* note 272.

280. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, CRIMINAL DEFENSE SYSTEMS 4 (1984). See also ABA CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 3 (1985) (contracts for defense services represent the largest percentage growth in defense services over the past decade); *Elbowing Out Public Defenders*, NAT'L L.J., Sept. 14, 1981, at 1, col. 1 (the contract system is the fastest growing form of indigent defense system in the country today).

281. In May, 1981, six lawyers boasted to the government of Greenville, South Carolina that they could save the county \$150,000 by taking over the caseload of the Public Defender Office. The Greenville County Bar Association, by an overwhelming 100-4 vote, expressed their reservations about the plan, but after only a few weeks of consideration, the County decided to dismantle the Public Defender Office and sign up the private contractors. *Elbowing out Public Defenders*, *supra* note 280.

282. See generally, R.J. Wilson, Contract-Bid Programs: A Threat to Quality Indigent Defense Services (1982) (unpublished report for the National Legal Aid and Defender Association); see also GIDEON UNDONE, *supra* note 186 (the implementation of contract systems by county officials confronted with shrinking budgets has led to serious abuses); LEFSTEIN, *supra* note 76, at 51 (the replacement in 1981 in Vancouver, Washington, of a public defender system by a contract system in order to save funds led to a decrease in the quality and zeal of the representation provided); UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CRIMINAL DEFENSE SYSTEMS 8 (1984) (counties with the

one year,²⁸³ and are usually lump-sum or fixed-fee agreements, which may actually institutionalize *disincentives* for quality representation.²⁸⁴ Any money spent by the attorneys on, for example, investigators or expert witness consultation comes from the attorneys' own profits from the contract. Hence, low expenditures on investigation mean more money for the lawyers. The lawyer has the incentive to dispose of the case as quickly as possible rather than to take the case to trial and spend a lot of time when no greater payment will result.²⁸⁵

The organized bar has attempted, often without success, to prevent local governments from continuing to expand the contract system. The Seattle-King County Bar Association Task force reported: "The Task Force believes that the fundamental constitutional right to appointed counsel for the indigent accused is *threatened* in King County by the current practice of awarding contracts for public defense services based primarily on a fixed fee per case, without consideration of clearly expressed criteria of quality."²⁸⁶

A report of the State Bar of California warned that whatever money a county might initially save by contracting for defense services, may be less than the expenses the county might incur by having to defend itself

contract system fell sharply behind all other counties in insuring the early appointment of counsel, only 12% of contract counties provided counsel within twenty-four hours of the defendant's arrest).

283. Spangenburg, Davis & Smith, *Contract Defense Systems Under Attack: Balancing Cost and Quality*, NLADA BRIEFCASE 12, 17 (1982).

284. See WASHINGTON STATE BAR ASSOCIATION, METHODS OF PROVIDING REPRESENTATION FOR THE INDIGENT CRIMINAL ACCUSED 15 (1975), cited in *State v. McKenny*, 582 P.2d 573, 577 (Wash. 1978) (when the compensation paid to an attorney is not at all related to the amount of work done, there is "an economic disincentive against satisfactory representation of the accused.").

285. An examination of the contract system in one county in Arizona reveals the dangers inherent in such a system. In *Arizona v. Smith*, 681 P.2d 1374 (Ariz. 1984), the Arizona Supreme Court, while considering an appeal based on ineffective assistance of counsel, decided to expand the record to examine the county's utilization of the contract system. Attorneys had submitted bids to the County Board of Supervisors, to represent indigent defendants. No information was obtained as to the background, experience, or capabilities of any of the attorneys. In 1982-83, the County chose the four lowest bids, each award providing for one-fourth of the total caseload. The lawyer for the defendant Smith had represented 149 felonies, 160 misdemeanors, 21 juvenile cases, and 33 miscellaneous criminal cases in that year, all of which constituted only a part-time practice for the lawyer who had a private civil practice as well. The Supreme Court of Arizona found that caseload "excessive, if not crushing", *id.* at 1380, noting that "an attorney so overburdened cannot adequately represent all his clients properly and be reasonably effective." *Id.* at 1381. The court concluded that "[w]e [a unanimous court] believe that the system for obtaining indigent defense counsel in Mohave County militates against adequate assistance of counsel for indigent defendants." *Id.*

286. SEATTLE-KING COUNTY BAR ASSOCIATION INDIGENT DEFENSE SERVICES TASK FORCE, GUIDELINES FOR ACCREDITATION OF DEFENDER AGENCIES, FINAL REPORT 1 (July 15, 1982) (emphasis added).

against civil lawsuits for disregarding issues of professional competence.²⁸⁷ The county would also have to pay the cost of retrying defendants whose convictions are reversed because of ineffective assistance. The House of Delegates of the ABA, attempting to insure that counties do not contract out defense services based solely on cost factors, approved a resolution concerning the contract system at *each* of its two general meetings in 1985.²⁸⁸

X. The Obligation of the Bar to Respond: Two Proposals

When the government, through inadequate funding, has permitted a system to exist in which public defenders are unable to comply with professional guidelines for competent representation, the organized bar must act to rectify the situation.²⁸⁹ The legal profession has an obligation to insure that the system providing representation for indigent defendants complies with professional standards of competency, and with the constitutional requirements of effective assistance of counsel and equal justice under the law. The very first Ethical Consideration of the Code, EC 1-1, informs the legal profession that "maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer."²⁹⁰

The profession has a self-interest in improving representation of indigents. Because of the working conditions prevailing in most defender offices, many attorneys stay there for a limited number of years. In their present state, most defender offices fail miserably as training grounds for

287. SUBCOMMITTEE ON CONTRACT DEFENSE SERVICES, STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES TO CRIMINAL DEFENDANTS, STATE BAR OF CALIFORNIA, REPORT AND RECOMMENDATIONS ON CONTRACT DEFENSE SERVICES 2 (1981).

288. In the Resolution approved in February, 1985, the ABA resolved that it "opposes the awarding of public defense contracts on the basis of cost alone, or through competitive bidding without reference to quality of representation." And the August, 1985, resolution urged that any contract entered into comply with both the NLADA's Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, and Chapter 5 (Providing Defense Services) of the ABA Standards for Criminal Justice. ANNUAL SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, REPORTS OF SECTIONS 17 (1985).

289. The *Report of the Joint Conference on Professional Responsibility*, 44 A.B.A. J. 1159, 1217 (1958) [hereinafter cited as *Report on Professional Responsibility*], noted the special obligation of the profession with respect to legal reform, and added that:

When the lawyer fails to interest himself in the improvement of the law, the reason does not ordinarily lie in a lack of perception. It lies rather in a desire to retain a comfortable fit of accustomed way, in a distaste for stirring up controversy within the profession, or perhaps in a hope that if enough time is allowed to pass, the need for change will become so obvious that no special effort will be required to accomplish it.

Moreover, the Report warned that "where change must be thrust from without upon an unwilling Bar, the public's least flattering picture of the lawyer seems confirmed." *Id.*

290. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 44.

young attorneys. By insuring proper funding and consequently proper staffing, the profession can strengthen the training provided trial attorneys. The 1981 ALI-ABA Houston Conference on Lawyer Competence emphasized the importance of an attorney's "transition education":

We are well aware that the early transition years of practice are a time of great importance. They are formative years for learning practice standards, developing a style and working for clients. Transition education refers to this especially vulnerable and crucial time in the early career of a lawyer when the profession can make an important impact upon practice quality.²⁹¹

The profession cannot condone training lawyers to learn that clients' needs can be short-circuited or that comprehensive preparation is not routinely expected or warranted. The profession can best impact upon the "practice standards" of defender offices by acting to insure that there is adequate funding for proper staffing of the offices.

It is also in the self-interest of lawyers to improve defender competence because the gross neglect and incompetence prevailing in the representation of indigents degrades and insults the entire profession. Maintaining public confidence in our criminal courts requires not only that justice be done, but that it *appears* that the system is just and fair.²⁹² For the profession to continue to accept and tolerate the public defender's rushed, superficial, and often inadequate level of representation, is to promote disrespect for all lawyers and to thwart the fair and effective administration of justice.²⁹³

291. ALI-ABA, COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, THE REPORT OF THE HOUSTON CONFERENCE: ENHANCING THE COMPETENCE OF LAWYERS 23 (1981). The need for training inexperienced lawyers in the skills of representing clients is illustrated by the results of a Law School Admissions Council survey indicating that law schools were not providing such training: 79.7% of the 1600 lawyers responding felt that law school had not prepared them to interview clients, 57.9% indicated they were unprepared to conduct fact investigations, 68.6% believed law school had not prepared them to counsel clients, and 77.3% indicated lack of training to prepare them to conduct negotiations. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264, 267-73 (1978). See also LAW SCHOOLS AND PROFESSIONAL EDUCATION, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR THE STUDY OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION 41-50 (1980).

292. See Carrington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291, 1292 ("The role of the advocate is, in important measure, to build trust in the fairness of the system. To inspire trust, the advocate must not only be vigorous, but he must also seem so. Thus we are as concerned with the appearance of zeal as with its reality.").

293. At least one long-time observer of the criminal justice system has maintained that the increased respect for the system that would result from a higher quality defender system, would lead to less crime. See C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 302 (1978) ("Nothing would contribute more to respect for law—and indirectly, thereby, to a reduction in crime—than to provide defendants with the 'effective assistance of counsel' guaranteed them by the Constitution.").

The Report of the Joint Conference on Professional Responsibility observed that "in the public mind, the whole administration of justice tends to be symbolized by its most dramatic branch, the criminal law."²⁹⁴ The public, therefore, regards the trial lawyer, the most obvious representative of the bar, as typical of the entire profession. Hence, the public may well attribute the failings of the defender to the profession at large.²⁹⁵

The low status of the criminal defense lawyer has long been a concern to the profession,²⁹⁶ yet calls to elevate the image of the poorly respected and financially unattractive position²⁹⁷ have gone largely unheeded. Lawyers concerned with the standing of their profession ought to realize that some financial self-sacrifice on their part may be needed to elevate the public defender system because it is unrealistic to expect any further infusion of public funds. The profession must not continue to countenance violations of its own standards and wink in acceptance as defenders fail to conduct needed investigations, speak to witnesses, communicate with their clients, and prepare a proper defense.

A. Lawyers' Registration Fees as a Source for Additional Funding

The problem of incompetent representation caused by too few defenders carrying excessive caseloads would be ameliorated if the Code provision of EC 2-25 were followed: "Every lawyer, regardless of profes-

294. *Report on Professional Responsibility*, *supra* note 289, at 1218.

295. THE REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979), prepared by the ABA Section on Legal Education and Admissions to the Bar, indicated that the entire profession would gain if trial lawyers were to act more competently and professionally:

Public discussion of this issue [lawyer competency] has focused almost exclusively on lawyer performance in the courtroom, there are two reasons why that criticism logically translates into a general concern with lawyer performance. The first is simply that in terms of lay perception the trial lawyer is identified with the lawyers generally. More importantly, however, there is good reason to expect that, if too many lawyers perform inadequately in the courtroom, the same is true of the many other settings in which lawyers serve (or disserve) their clients. A lawyer's performance at trial is merely more conspicuous, taking place in front of experienced observers—judges, other lawyers, and members of the public.

Id. at 8.

296. See, e.g., Laumann & Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 AM. B. FOUND. RESEARCH J. 155, 166-67 (lawyers were asked to rank legal specialties as to general level of prestige: criminal defense ranked twenty-third out of thirty); Bazelon, *Defective Assistance*, *supra* note 52, at 20 (providing defense services to the poor is a non-prestigious activity); Watson, *On the Low Status of the Criminal Bar: Psychological Contributions of the Law School*, 43 TEX. L. REV. 289, 291 (1965).

297. See, e.g., REPORT OF THE CONFERENCE ON LEGAL MANPOWER NEEDS OF CRIMINAL LAW, ARLIE HOUSE, VIRGINIA (1966), reprinted in 41 F.R.D. 389, 411 (1966) ("Every effort should be made to elevate the status of the defense lawyer, in the eyes of the bar and in the eyes of the public generally.").

sional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer. . . ."²⁹⁸ The vast majority of lawyers, however, do not give a significant amount of time to representing the poor.²⁹⁹ And in recent years, the amount of pro bono work that had been occurring in the medium to large size firms has been cut back.³⁰⁰

EC 2-29 also imposes a moral duty on the profession to provide representation to the poor. EC 2-29 informs lawyers that if either a bar association or a court requests them to represent an indigent, the lawyer should not refuse to undertake the representation except for compelling reasons.³⁰¹ The Supreme Court established this duty in *Powell v. Alabama*: "Attorneys are officers of the court, and are bound to render service when required by such an appointment."³⁰² A refusal of the court's

298. The ideals of the Code were elevated to the rank of duties when the ABA House of Delegates in 1975 passed a resolution declaring that "it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services. . . ." (reprinted in ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, TOWARD A MANDATORY CONTRIBUTION OF PUBLIC SERVICE PRACTICE OF EVERY LAWYER 26 (1979)). See *Report on Professional Responsibility*, *supra* note 289, for an historical perspective of the public service obligation; see also W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 491 (3d ed. 1923) (from the fifteenth century in England, a "serjeant-at-law" could be required by the court to represent a poor person).

299. The Private Bar Involvement Project of the ABA estimates that 12.2% of all attorneys participate in either a "compensated" (reduced charge) or free pro bono program providing legal services to the poor. ABA, 1985 DIRECTORY OF THE PRIVATE BAR INVOLVEMENT PROGRAM 198, Table 7. The former director of the ABA's project to assist pro bono publico plans has observed: "In the final analysis, only a handful of exceptional attorneys are attempting to meet the vast legal needs of the public and to atone for the general failure of the bar to serve the non-rich public." Tucker, *Pro Bono ABA?*, cited in R. NADER & M. GREEN, VERDICTS ON LAWYERS 26, 26-27 (1976); see also Lochner, *The No Fee and Low Fee Practice of Private Attorneys*, 9 LAW AND SOC'Y REV. 431 (concluding that most lawyers take such cases for the purposes of gaining experience and attracting new clients, and that the work is done for the middle class and not the poor).

300. For a discussion of the pressures on these firms that have resulted in their diminishing commitments to pro bono work, see Phillips, *Financing the Right to Counsel: A View from the Private Bar*, 19 LOY. L.A.L. REV. 375, 379 (1985).

301. The Code does not specify what would constitute a compelling reason, but EC 2-27 gives examples of what would not:

Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

See also MODEL RULES OF PROFESSIONAL RESPONSIBILITY, *supra* note 45, Rule 6.2 ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause. . . .").

302. 287 U.S. 45, 73 (1932). Courts have interpreted *Powell* to mean that the lawyer is obligated to provide the services without compensation. For example, the Ninth Circuit has noted that:

request may constitute contempt.³⁰³ Other courts have held that performing free services to indigents is a duty incident to the privilege of practicing law.³⁰⁴ In fact, many states include as part of the oath for admission to the Bar, a pledge similar to that required by Arkansas: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice."³⁰⁵ It seems preferable, however, to avoid conscripting those unfamiliar with criminal defense work and undesirous of representing indigent defendants, and to rely instead on an expanded defender system with full-time expert attorneys.

The Comment to Model Rule 6.1 also states that each lawyer should participate in or *otherwise support* the provision of legal services to indigents.³⁰⁶ The time may well have come to mandate bar support in the

An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to and assumed this obligation, and when he is called upon to fulfill it he cannot contend that it is "taking of his services."

United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). See also State v. Rush, 46 N.J. 399, 217 A.2d 441, 21 A.L.R.3d 804 (1966) (the lawyer owes a duty to the court to represent indigents, and is obliged to answer the court's call).

303. State v. Frankel, 119 N.J. Super. 579, 293 A.2d 196 (1972), *cert. denied*, 409 U.S. 1125 (1973).

304. See, e.g., *Vise v. County of Hamilton*, 19 Ill. 78, 79 (1857); see also *Ex parte Dibble* (Hamaas v. State), 310 S.E.2d 440, 441 (S.C. App. 1983) ("[A] lawyer, by accepting a license to practice law . . . assumes the obligation of representing, without pay, indigent defendants in criminal cases.").

305. Other states' oaths containing the identical or similar language include Indiana, Iowa, Kentucky, Missouri, Nebraska, North Dakota, South Dakota, Florida, South Carolina, and Wisconsin. The language of this oath was first adopted in the state of Washington over one century ago and is still required by statute (WASH. REV. CODE ANN. § 2.48.210 (1961)) and Rule (WASH. RULES FOR ADMISSION TO PRACTICE, Rule 5(G) (1965)). The American Bar Association adopted the language in its recommended lawyer's oath in 1908 (33 RULES OF THE ABA 584 (1908)). The oath was relied upon by the Arkansas Supreme Court in holding that even though the maximum payment to assigned counsel of \$350 per criminal case was inadequate, it was constitutional because the oath taken by all lawyers requires representation given free of any charge if needed. *State v. Ruiz*, 269 Ark. 331, 602 S.W.2d 625 (1980). See also *Payne v. Superior Court*, 17 Cal. 3d 908, 920 n.6, 132 Cal. Rptr. 405, 414 n.6 (1976), where the court relied on § 6068(h) of the CAL. BUS. & PROF. C. provision that a lawyer should not reject the "cause of the defenseless or the oppressed" to indicate that there is an ethical obligation to serve without compensation.

306. The Kutak Commission which drafted the Model Rules first recommended a specific requirement of pro bono service of "forty hours per year . . . or the [financial] equivalent thereof." See Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 736 n.5 (1980). A requirement was imposed on the lawyer to "make an annual report concerning such service to appropriate regulatory authority." *Id.* at 736 n.6. There was widespread criticism of the reporting requirement by the bar. See, e.g., AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT OF THE COMMITTEE ON LEGAL ETHICS AND DISCIPLINE CONCERNING THE

form of requiring all lawyers licensed to practice in a given state to pay an annual fee to be used to hire additional lawyers to represent indigent defendants. The mechanism for the collection of fees from practicing lawyers is already in place. Every state now requires that lawyers actively practicing in that state pay an annual or biennial registration fee or dues.³⁰⁷ The amount of the fee ranges from \$25 to \$300 per year.³⁰⁸ Presently, these funds are used by the states primarily to finance disciplinary agencies which investigate client complaints against lawyers. They are also used for client security funds,³⁰⁹ unauthorized practice of law public protection programs, continuing legal education programs, fee arbitrations, and the increase of general funds in the state treasuries.³¹⁰

An Agency for the Defense of the Indigent Accused, directed by appointees of the state bar association, could determine the amount

JANUARY, 1980 DISCUSSION DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT 35 (1980) (terming the requirement "objectionable"). In June, 1980, the Commission voted to delete the reporting requirement. *Commission Votes Down Pro Bono Reporting*, 66 A.B.A. J. 951 (1980). In December, 1980, Kutak announced that the Committee had amended the proposed rule so as to provide an ethical duty instead of a mandatory obligation, acknowledging that "the time for mandatory pro bono hasn't come." Slonin, *Kutak Panel Report: No Mandatory Pro Bono*, 67 A.B.A. J. 33 (1981).

307. ABA STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE AND CENTER FOR PROFESSIONAL RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS Chart II (1985) [hereinafter cited as ABA SURVEY]. See *Lathrop v. Donohue*, 367 U.S. 820 (1961), where the Court upheld the constitutionality of the requirement that all lawyers practicing in a state pay dues to be a member of the State Bar. Some counties impose additional requirements. For example, El Paso County, Texas, requires that lawyers as a precondition of practicing law, take two divorce cases per year, without charge. In 1982 a court order was issued to support the county bar association's resolution; certain attorneys (e.g., prosecutors and law clerks) were exempted. See *In re El Paso Bar Association Pro Bono Publico Program*, Order of the District Courts of El Paso County, Texas (Sept. 24, 1982), cited in Wilson, *Legal Aid and Professional Responsibility: An Unmet Need and a Failure of Duty*, n.28 (1985) (unpublished manuscript). All members of the Orange County (Florida) Bar Association must accept two pro bono referrals each year or make a financial contribution of \$250 to the Legal Aid Society. However, membership in the Orange County Bar Association is voluntary. Marin-Rosa & Stepter, *Orange County—Mandatory Pro Bono in a Voluntary Bar Association*, 59 FLA. B.J. 21, 21-22 (Dec. 1985).

308. ABA SURVEY, *supra* note 307.

309. Client security funds are generally created to compensate individuals who have suffered monetary losses because of lawyer dishonesty. Lawyers' malpractice insurance commonly excludes coverage for such dishonesty or fraud. See generally Wray, *A New Way to Serve our Clients: The Clients' Security Fund*, 35 TEX. B. J. 1023 (1972).

310. For example, half of the lawyers' registration fee collected in New York State is deposited in the general fund of the state treasury. CLIENT'S SECURITY FUND OF THE STATE OF NEW YORK, 1984 ANNUAL REPORT 6. For decisions upholding the power of the state to impose licensing fees on attorneys as a general revenue measure, see *Sweeney v. Cannon*, 23 A.D.2d 1, 258 N.Y.S.2d 183 (1965); *Williams v. City of Richmond*, 177 Va. 477, 14 S.E.2d 287 (1941); *In re Johnson*, 47 Cal. App. 465, 190 P. 852 (1920).

needed to subsidize defender agencies in that state.³¹¹ Fees paid by lawyers would be increased to effectively subsidize the program.³¹² Those states which presently use the fees to add to the general state treasuries, could specifically designate those funds for defense of the indigent.

Those opposing the imposition of such a fee may argue that the states would then cut their own financing of legal services and utilize the lawyers' fees to continue overall funding at the same level. Leaders of the bar associations in each state must act to insure that public funding would continue at least at the same level, and that the lawyers' fees be applied exclusively to increase funding for defender offices.³¹³

Lawyers may complain that responsibility for providing effective assistance ought to be shared by all taxpayers equally.³¹⁴ Lawyers, how-

311. The Agency would need to conduct a thorough evaluation of the delivery of defense services in that state. The assessments undertaken by the National Center for Defense Management (*see supra* notes 192, 206, 209, 227, 234, 265), the ABA Standing Committee on Legal Aid an Indigent Defendants (*see supra* notes 216, 257), and the National Defender Institute (*see supra* note 191) could be models. Furthermore, the work of the National Legal Aid and Defender Association, commissioned by the Ohio Public Defender Commission to evaluate the effectiveness of defender programs throughout the state (*see supra* note 189, 255), might also be especially valuable.

312. Some states may have raised more income than required by the designated purposes of the funds, and therefore little or no increase in fees would be required. For example, the revenues raised in the three years ending December, 1984 which were allocated to the Client Security Fund in New York exceeded \$4,000,000, whereas the Fund disbursed only slightly over \$1,500,000 of those funds. CLIENT'S SECURITY FUND OF THE STATE OF NEW YORK, 1984 ANNUAL REPORT 6-7.

313. Specific details would be worked out at the state level. For example, it could be required that the percentage of the total criminal justice budget allocated to indigent defense services remain at least at the level it had been prior to the institution of the lawyers' contributions, or that the percentage allocated to defense services remain at the same percentage of the prosecutor's budget as had previously been the case. The Agency might choose to distribute the funds directly to counties in proportion to the number of indigents charged with criminal offenses. Alternatively, the Agency could require defender offices to submit proposals detailing how the additional funds would be utilized. The Agency could then compare the actual office caseload per attorney with the established national guidelines in assessing which offices had the greatest need.

314. In fact, one segment of the private bar has been providing exceptional financial support. Lawyers representing indigents in federal court have been expected to do so at personal, financial sacrifice. The fees allowable under the Criminal Justice Act (CJA) do not and were not intended to fully compensate a lawyer for his time and services. *See United States v. Hildebrandt*, 420 F. Supp. 476 (S.D.N.Y. 1975); *United States v. Thompson*, 361 F. Supp. 879, 887 (D.D.C. 1973). The legislative history of the CJA on the issue of lawyer compensation is summarized in the following:

As reported by the subcommittee, H.R. 4816 provided for compensation to court-appointed attorneys at a rate not to exceed \$15 per hour for time reasonably spent, and carefully accounted for, on behalf of an impoverished defendant. This amount was conceded by virtually every witness at the hearings to be below normal levels of compensation in legal practice. It was nevertheless widely supported as a reasonable basis upon which lawyers could carry out their profession's responsibility to except [sic] court appointments. . . .

ever, are especially qualified to recognize deficiencies in the delivery of legal services and realize the need to insure constitutional and professional standards in the defense of all.³¹⁵ The legal profession, having a monopoly on the provision of legal services, has the burden to insure that everyone whose liberty is at stake receives competent representation.

B. Utilization of Interest on Lawyers' Trust Accounts

An alternative source for additional funding may be monies from Interest on Lawyers Trust Accounts (IOLTA). Lawyers had traditionally placed in aggregated, non-interest bearing accounts, those client funds held in trust for future use which were either so small in amount or expected to be held for such short duration that they could not be invested productively on behalf of the client.³¹⁶ Since the funds belonged

H.R. Rep. No. 846, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2990, 2997-98.

Appointed counsel in state courts are also frequently undercompensated. *See Lindh v. O'Hara*, 325 A.2d 84, 92 (Del. 1974) (reasonable compensation for appointed counsel is somewhere between a mere "honorarium" and the amount received by privately retained counsel); *People v. Johnson*, 417 N.E.2d 1062 (Ill. App. Ct.), *aff'd*, 429 N.E.2d 497, 500 (1981) ("The formula for reasonable compensation should be the hourly fee normally charged for comparable [trial court] services, less an amount adequate to satisfy the *pro bono* factor."); *State v. Robinson*, 465 A.2d 1214 (N.H. 1983) (compensation need not equal that of retained counsel and the lawyer's ethical obligation to provide counsel may be considered in the determination); *State v. Rush*, 46 N.J. 399, 412, 217 A.2d 441, 448 (1966) (payment ought to equal 60% of the customary fee); *Tappe v. Circuit Court*, 326 N.W.2d 892 (S.D. 1982) (payment to appointed counsel should be one-third below the prevailing rate received by retained counsel); *State v. Sidney*, 66 Wis. 2d 602, 610, 225 N.W.2d 438, 442 (1975) (appointed counsel ought to receive two-thirds the prevailing rate charged private clients for similar services). One state supreme court has found that when funds allocated by the state to pay appointed counsel have been expended, attorneys must continue to provide representation without expecting payment from the state's general revenue. *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981), *cert. denied*, 454 U.S. 1142 (1982). The Eighth Circuit upheld the ruling of the Missouri Supreme Court, and concluded that: "Attorneys may constitutionally be compelled to represent indigent defendants without compensation." *Williamson v. Vardeman*, 764 F.2d 1211, 1214 (8th Cir. 1982). *But see Hulse v. Wifvat*, 306 N.W.2d 707 (Iowa 1981) (fee paid to appointed counsel ought to equal that received by a lawyer representing a paying client).

315. A Report of the New York City Bar Association, considering the profession's *pro bono* obligations, realized the special responsibilities of the profession:

We do not mean to suggest that the legal profession alone bears the responsibility for, or has the resources adequate to satisfy, the needs for legal services and reform of justice in our society. What we do assert is that every member of the profession, *as a professional and as an officer of the law*, has a unique responsibility and opportunity to make some contribution to the satisfaction of such needs.

THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, TOWARD A MANDATORY CONTRIBUTION OF PUBLIC SERVICE PRACTICE BY EVERY LAWYER 9 (1979) (emphasis in original).

316. When the funds received are large in amount or to be held for a long period of time, the funds are placed in interest-bearing accounts in the name of and for the benefit of the client. It is, however, impractical to establish separate interest-bearing accounts for small or short-term accounts.

to the clients until needed for the specific transaction, the lawyer was not permitted to receive any interest on the funds. The banks in which the money was deposited, therefore, had use of the funds without payment of any interest.

When the federal funding available for the Legal Services Corporation was reduced in the early 1980's, appeals for local compensation for the reductions led to the creation of IOLTA programs which pool attorney trust accounts to generate interest income to subsidize civil legal services programs.³¹⁷ Since 1981, forty-one states and the District of Columbia have enacted IOLTA programs,³¹⁸ all but six providing for voluntary lawyer participation.³¹⁹ The Florida Supreme Court³²⁰ and a federal District Court³²¹ have upheld the constitutionality of Florida's IOLTA plan, the first IOLTA plan in the nation.³²² A California Court of Appeal has unanimously upheld the constitutionality of its mandatory program.³²³ The ABA Standing Committee on Ethics and Professional Responsibility has concluded that lawyer participation in IOLTA programs is ethically permissible.³²⁴ Although the concept of utilizing interest on trust accounts is a new one in this country, foreign bar associations have financed public interest projects since the 1960's with such interest

317. See, e.g., Berg & Johnson, *A Proposed New Revenue Source for Legal Services in Texas*, 44 TEX. B. J. 57 (1983); Parker, *Client Trust Accounts: A Funding Source for Legal Services*, 54 N.Y. ST. B.J. 359 (1982). As of April 1, 1985, the seventeen operational IOLTA programs reported interest income of over \$27,737,000 of which \$13,158,000 was distributed to legal services for the poor. National IOLTA Clearinghouse, IOLTA Update, Vol. 2, No. 4, at 11 (Spring 1985). One state, Maryland, instituted a new quasi-public corporation, Maryland Legal Services Corporation, to administer the IOLTA program and allocate 100% of income received to civil legal services programs. MD. ANN. CODE art X, § 44(a)(2) (1984 Cum. Supp.)

318. National IOLTA Clearinghouse, IOLTA Update, Vol. 3, No. 4, at 1 (Spring 1986).

319. IOLTA participation is mandatory for all attorneys in Arizona, California, Iowa, Minnesota, Ohio, Washington, and Wisconsin. IOLTA Update, Vol. 3, No. 3, at 6-11 (Winter 1986). The start-up date for Wisconsin is January, 1987. IOLTA Update, Vol. 3, No. 4, at 7 (Spring 1986).

320. *In re Interest on Trust Accounts*, 356 So. 2d 799 (Fla. 1978).

321. *Cone v. Florida Bar*, 626 F. Supp. 132 (M.D. Fla. 1985). This decision has been appealed and is scheduled to be heard by the Eleventh Circuit in the fall of 1986.

322. The Florida plan became operational on September 1, 1981. It was followed by New Hampshire on January 1, 1982, California on March 1, 1983, and Maryland on March 25, 1983. See REPORT OF THE SPECIAL COMMITTEE ON MANDATORY IOLTA TO BOARD OF GOVERNORS, MARYLAND STATE BAR ASSOCIATION 9 (1985).

323. *Carroll v. State Bar*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (1985), cert. denied sub nom., *Chapman v. State Bar of California*, 106 S. Ct. 142 (1985). For a comprehensive discussion of the constitutional issues involved, see Siegel, *Interest on Lawyers' Trust Account Program: Do They "Take" Property of the Client?*, 36 U. FLA. L. REV. 674 (1984).

324. ABA Standing Comm. on Ethics and Prof. Resp., Formal Opinion No. 348 (1982).

income.³²⁵

The Internal Revenue Service has approved the tax-exempt status of an IOLTA plan, ruling that the interest earned was not income attributable to the client.³²⁶ It is necessary, however, for the state to set up a tax-exempt charitable foundation to administer the plan since interest is taxable and the Internal Revenue Service does not regard state bar associations as public tax-exempt agencies.³²⁷ The Federal Reserve System³²⁸ and the Federal Deposit Insurance Corporation³²⁹ have authorized IOLTA programs to receive interest payments from attorneys' deposits of client trust funds.

As IOLTA funds first became available, states utilized the monies for a variety of purposes, such as law student loans and scholarships, community law-related education programs, establishment and maintenance of lawyer referral systems, client security funds,³³⁰ and any other program that the state's supreme court approved for the benefit of the public.³³¹ Although no state currently utilizes IOLTA funds to subsidize defender agencies, the use of IOLTA funds to aid in the defense of the indigent accused of a crime clearly falls within the overall public interest goals of the IOLTA programs.

325. ABA TASK FORCE AND ADVISORY BOARD ON INTEREST ON LAWYER TRUST ACCOUNTS, REPORT TO THE BOARD OF GOVERNORS 3 (July 26, 1982). As of 1982, at least twenty jurisdictions in five countries had IOLTA programs, and in Canada alone the annual income totals about \$34 million. *Id.* at 4. The statutes for use of IOLTA monies enacted in the various provinces of Canada are almost identical with one another and mandate lawyers' participation. Boone, *A Source of Revenue for the Improvement of Legal Services, Part I: An Analysis of the Plans in Foreign Countries and Florida Allowing the Use of Clients' Funds Held by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Organized Bar*, 10 ST. MARY'S L.J. 539, 546-47 (1979).

326. Rev. Rul. 81-209, 1981-2 C.B. 16-17 (1981).

327. Rev. Rul. 77-232, 1977-2 C.B. 71 (1977).

328. Letter from the Gen. Couns., Fed. Reserve Sys. to the President of the Idaho Law Found. (Jan. 28, 1983), *reprinted in* Interest on Law. Acc. Fund of the State of N. Y., IOLTA 44 (1985).

329. Letter from the Off. of the Gen. Couns., Fed. Deposit Ins. Corp. to the B. of Trustees of the N. Y. S. Interest on Law. Acc. Fund (Aug. 8, 1984), *reprinted id.* at 43.

330. The initial purpose of the Florida Bar in attempting to use IOLTA funds was to develop a revenue source for the clients' security fund, and it was not until 1977 that the Bar sought to use the funds for other purposes. *In re* Interest on Trust Accounts, 356 So. 2d 799, 804 n.32 (Fla. 1978).

331. See National IOLTA Clearinghouse, IOLTA Update, Vol. 2, No. 3, at 10-12 (Winter 1985), for a listing of each state's approved use of IOLTA funds. The Internal Revenue Service had initially approved the use of funds for only four general categories: (1) to provide legal aid to the poor; (2) to provide student loans; (3) to improve the administration of justice; and (4) other programs approved from time to time by the state's supreme court for exclusively public purposes. *In re* Interest on Trust Accounts, 372 So. 2d 67, 69 (Fla. 1979). Over half the states currently have catchall categories permitting funding for "projects which improve the administration of justice." IOLTA Update, Vol. 4, no. 1, at 3 (Summer 1986).

In all but five of the IOLTA plans, the state bar associations, without the involvement of the legislatures, initiated the IOLTA plans and petitioned the state supreme courts for the requisite court orders to implement the plans which were typically administered by state bar foundations.³³² It is, therefore, the state bar, seeking approval of the supreme court, which has the power to designate agencies providing representation for indigent defendants as recipients of the IOLTA funds. The five states which passed legislation instituting IOLTA plans, however, would need legislative amendment to incorporate defender offices as recipients of interest income.³³³

The bar must realize the desperate state of the defender agencies, and although states must provide counsel in criminal matters, public funds provided are insufficient.³³⁴ The judiciary, confronted daily with inadequacies of representation resulting from insufficient funding, could be expected to fully support additional funding for indigent defense.

Since there are no public funds involved in IOLTA plans (the banks are the only ones incurring a financial loss when an IOLTA plan is adopted),³³⁵ the resistance by taxpayers that may occur when there is the direct expenditure of taxpayer monies for representation of indigent defendants ought not occur. The states now providing for voluntary lawyer participation in IOLTA plans could greatly increase the funds received by making lawyer participation mandatory.³³⁶

332. The five states in which legislation was enacted for IOLTA are California, Connecticut, Maryland, New York, and Ohio. IOLTA Update, Vol. 3, No. 3, at 6-11 (Winter 1986).

333. The legislation that created IOLTA in New York, for example, although entitled "Interest on Lawyer Accounts—Provisions of Legal Services to Poor," specifically excludes the use of any IOLTA funds for assistance in any criminal proceeding. Act of July 25, 1983, ch. 659, 1983 N.Y. Laws 1279; see also MD. ANN. CODE art X, § 45 (J)(b)(2) (1984 Cum. Supp.).

334. See *supra* text accompanying notes 174-211.

335. There has been little opposition by banks to IOLTA plans, although the Florida State Bankers did file a brief in opposition to the bar association petition in Florida. Parker, *supra* note 315, at 361 n.11. Once the IOLTA structure is in place, the accounts remain profitable to the banks. Interest is paid at the same level as all other NOW checking accounts. The opposition of the banks in the Australian state of Victoria did prevent establishment of an IOLTA plan until 1964, when the Solicitors' Guarantee Fund (comparable to clients' security funds in America) could no longer service all the claims and the Victoria parliament voted to institute a plan. See Boone, *supra* note 325, at 543. Within a few years, revenues collected exceeded demand of the Guarantee Fund and a Law Foundation was created to generally improve the practice of law in Victoria. *Id.*

336. The mandatory program in California, for example, is currently bringing in over \$1,000,000 a month. National IOLTA Clearinghouse, IOLTA Update, Vol. 3, No. 3, at 3 (Winter 1986). There might, however, be some resistance by the state bar associations to requiring lawyer participation. The Maryland State Bar Association Board of Governors in November, 1985, rejected the unanimous recommendation of its own Special Committee on IOLTA, which had recommended that lawyers' participation in the state's IOLTA program be required. *Id.* at 4. The Section Council of the Delivery of Legal Services, and the Board of the

The burden on the participating lawyer is minimal. The attorney deposits the funds into an IOLTA interest-bearing bank account instead of a non-interest-bearing account. The financial institution calculates the interest and transfers it to the state bar foundation. It would be the responsibility of the Bar Foundation administering the plan to insure that public funding of indigent defense continues at least at previous levels and that the IOLTA funds designated for a specific defender agency be a supplement to and not a replacement of state or county contributions.³³⁷

Conclusion

The lack of adequate funding and the resulting excessive caseload assigned to public defenders interfere with the defense counsel's ability to effectively and competently represent their clients. Inadequate investigation of the facts and the law pertaining to a client's case, insufficient time for counsel to communicate and consult with the defendant, and excessive reliance on guilty pleas as an attempt by defenders to manage an overwhelming caseload, threaten the sixth amendment right to effective assistance of counsel.

Maryland Volunteer Lawyers Services, Inc., also had unanimously recommended a mandatory plan. See REPORT OF THE SPECIAL COMMITTEE ON MANDATORY IOLTA TO BOARD OF GOVERNORS, MARYLAND STATE BAR ASSOCIATION 3 (November 1985). Some states with voluntary plans have been successful at achieving high rates of participation. The New Hampshire Bar Association's *Law Weekly* carries an "Honor Role" listing all new IOLTA participants, and the state currently has a 48% participation rate from eligible attorneys, the highest rate of all voluntary programs. IOLTA Update, Vol. 3, No. 3, at 3 (Winter 1986). One highly successful county bar association in Colorado has produced a video entitled "Successful IOLTA Recruiting" to assist other counties in their efforts. IOLTA Update, Vol. 4, no. 1, at 5 (Summer 1986). The Maryland Legal Services Corporation conducted an intense campaign in which every lawyer received at least two mailings and a telephone call to encourage participation. As a result, the enrollment rate of eligible attorneys as of November, 1985, was 44.8%. See REPORT OF THE SPECIAL COMMITTEE ON MANDATORY IOLTA TO BOARD OF GOVERNORS, MARYLAND STATE BAR ASSOCIATION 8, 9 (November 1985). Florida, on the other hand, has a participation rate of only 21%. Still-pending constitutional challenge (see *supra* note 321), may well be a prime factor. See IOLTA Update, Vol. 3, no. 4, at 7 (Spring 1986). However, New York, where there is no such challenge, has a participation level of only seven percent. N.Y.L.J., Sept. 23, 1985, col. 3, at 1. Delaware, in 1983, began a unique Opt-Out plan whereby it is assumed that all attorneys will be participating, but any attorney may choose not to partake in the plan. See Supreme Court of Delaware, Order of September 23, 1983 Approving Amended Rule DR 9-102 of the Delaware Lawyers' Code of Professional Responsibility. By 1985, 90% of all eligible attorneys were participating. IOLTA Update, Vol. 3, No. 3, at 7 (Winter 1986). Two years after Delaware instituted its plan, the District of Columbia and Rhode Island adopted similar Opt-Out arrangements. See District of Columbia Court of Appeals Order No. M-155-85 (Feb. 22, 1985); Rhode Island Supreme Court Order amending Rule 47 of the Supreme Court Rules (November 21, 1984).

337. See *supra* note 313.

Local governments face financial pressures which threaten further decreases in funds allocated for representation of the indigent. Consequently, there may be increased reliance on systems which undermine the effectiveness of counsel: the contract system and the "zone defense".³³⁸ In addition, recent Supreme Court decisions make it more difficult for defendants to successfully appeal their convictions based on ineffective assistance grounds.³³⁹ If there is to be a "strong presumption" of attorney competence,³⁴⁰ that presumption must have some basis in fact. It becomes, therefore, all the more necessary to insure that the defense counsel provided at the trial level is not pressured by an overwhelming workload to neglect the interests of his clients and fail to perform the essential tasks of representation.

The legal profession as well as the state has the responsibility to insure effective assistance of counsel. The bar must not ignore this crisis of considerable and perhaps increasing proportions—the publicly financed defender programs are not able to provide competent, effective assistance of counsel. The right to counsel guaranteed by *Gideon* is meaningless if the number of counsel that publicly financed defender programs can provide is insufficient to meet the needs of indigent defendants. Ultimately, when, as a result of the underfinancing of defender offices, counsel is ill-prepared and unable to pursue the defendant's cause diligently and competently, the mandate of the Eighth Amendment is redefined so as to require the mere presence, and not the assistance, of counsel.

338. See discussion of problems created by the "zone defense" and the contract system *supra* text accompanying notes 272-288.

339. See discussion *supra* text accompanying notes 97-143. The Court itself in a recent case noted: "As is obvious, *Strickland's* standard, although by no means insurmountable, is highly demanding." *Kimmelman v. Morrison*, 54 U.S.L.W. 4789, 4794 (1986).

340. See *supra* note 101.

